

R E P O R T S
O F
C A S E S,
U P O N

Appeals and Writs of Error,

I N T H E
High Court of Parliament;

From the Year 1701, to the Year 1779.

W I T H
T A B L E S, N O T E S and R E F E R E N C E S.

B Y *JOSIAH BROWN*, E S Q.
B A R R I S T E R A T L A W.

V O L U M E T H E S E V E N T H.

L O N D O N:

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R E P O R T S

C A S E S

Appeals and Writs of Error

of the Court of Appeals



TABLES, NOTES, and REFERENCES

BY JOSIAH BROWN, Esq.

BARRISTER AT LAW

VOLUME THE SEVENTH

L O N D O N

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C A S E S

HEARD and DETERMINED

IN THE

High Court of Parliament.

Ann Salter, spinster, - - Appellant. Case 1.

Francis Hite, and others, - Respondents.

1st March 1773.

MICHAEL SALTER ASHE, the validity of whose will was the subject of the present contest, was, for the greatest part of his life, in very indigent and necessitous circumstances; exercising the business of an apothecary at *Crediton*, in the county of *Devon*, under his original name of *Michael Salter*; but deriving from thence scarcely sufficient to supply him with the common necessities of life. In this situation he continued until a very few years before his death, receiving, and indeed chiefly depending upon the bounty of his friends and acquaintance, for the support of himself and family; particularly of the respondent *Hite*, who, for a course of many years, very liberally supplied him with victuals, drink, apparel and money; of which Mr. *Salter* always entertained a very grateful remembrance, and frequently declared his resolution to make a recompence for these kindnesses to Mr. *Hite*, or to his family, if ever it should be in his power.

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About the year 1763, one *Henry Ashe*, a relation of *Salter's* died, upon whose death he came into the possession of an estate of about 300 *l.* a year, and assumed the surname of *Ashe*; but still retaining a grateful sense of his many former obligations to Mr. *Hite*, he from this time constantly employed him as his attorney, and consulted him upon every material transaction of his life, save only as to the disposition which he meant to make of his fortune after his death; and which he might probably think it improper to employ, or advise with Mr. *Hite* about, as he intended that *Hite* and his family should, in a certain degree, be benefited by that disposition; for he used every imaginable precaution, to conceal the contents of his will, from the knowledge of all those who were to be interested therein; and yet was determined to make such a disposition of his fortune, as might reasonably satisfy the expectations of those, whom he considered as objects of his attention, either from nature, affection or gratitude.

He accordingly employed one *Matthew Andrew Paul* an attorney of credit and character at *Exeter*, to prepare his will; which bore date the 31st of *July* 1766, and was executed by the testator at the *Turk's Head*, an inn at *Exeter*, about a week afterwards, in the presence of Mr. *Paul*, *Josias Salter*, a brother-in-law of the testator, and one *Elizabeth Caunter*, an intimate acquaintance and neighbour of the testator's at *Crediton*, and these three were the subscribing witnesses to his will.

By this will, the testator, in the first place, provided for his wife in these words: *viz.* " I give unto my beloved wife
 " *Hannab Salter Ashe*, one annuity or yearly rent charge of
 " 80 *l.* to be issuing and payable quarterly, out of all that my
 " manor and all those my messuages, bartons, farms, lands, tenements, hereditaments and premises, with their appurtenances,
 " situate in the parish of *Sowton*, otherwise *Clist Fomison*, in the
 " said county; which said annuity I compute, and declare to be
 " more than the third part of the clear net produce and income
 " of all my said lands and estates; and which I hereby intend,
 " will and declare, shall be in full satisfaction of all her dower
 " and thirds, which she may hereafter claim to have after my
 " cease, out of my said manor, lands and estates aforesaid, or other
 " my lands and estates whereof I shall die seised; and which
 " said

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“ said annuity I will and declare to be a sufficient maintenance
 “ for her ; and more so, in that I had no portion or fortune
 “ with her.” The testator then proceeded to give to his wife,
 and to his sister *Ann Salter* the appellant, all his household
 goods and furniture equally between them ; on condition that
 his wife should, within six months after his death, execute a
 release of her dower to his trustees afternamed : But in case she
 refused to do so, then the testator revoked that bequest, and gave
 his said household goods and furniture to his trustees and exe-
 cutors, in order that they might sell the same, and apply the
 money arising therefrom towards payment of his debts, legacies
 and funeral expences. The testator then made provision for his
 other relations, by giving them annuities for life, chargeable
 upon his real estates ; namely, to his cousin the respondent *William*
Salter, an annuity of 50 *l.* immediately, and another annuity of
 40 *l.* after the death of the testator’s wife, and upon the contin-
 gency of his sister *Anne Salter*’s being then living ; to *Mary* the
 daughter of the said *William Salter*, an annuity of 20 *l.* to com-
 mence after the death of her father ; to his cousin the respon-
 dent *Margaret Salter*, an annuity of 20 *l.* immediately ; and to
 his cousin *Elizabeth Williams*, a legacy of 20 *l.* And after giving
 several small legacies to his acquaintance and servants, the testator
 gave to the respondent *Francis Hite*, a legacy of 350 *l.* in the
 following words : viz. “ Also I give to *Francis Hite* of *Crediton*
 “ aforesaid, Gent. the sum of 350 *l.* of lawful money of *Great*
 “ *Britain*, who hath been a particular friend unto me for many
 “ years past, and from whom I have had and received many valuable
 “ assistances during the time of my adversity, and before my pre-
 “ sent estate and fortune descended unto me by the death of
 “ *Henry Ashe*, Esq; and since ; I do acknowledge and declare
 “ his true and just performance of the transactions of my affairs,
 “ for which no ample compensation hath been made him ; and I
 “ give unto the said *Francis Hite* the said 350 *l.* over and beyond
 “ the monies he hath already received of me ; And which said
 “ sum I do hereby will and declare, is by me meant and intended
 “ to be in full of all his demands on me, or my estate and
 “ effects, for his transactions as aforesaid.” The testator then
 proceeded to dispose of his real estates ; and after devising a part
 of them to the respondent *John Partridge* the younger, for a
 term of 200 years, as an auxiliary fund to his personal estate, for
 the payment of his debts, legacies and funeral expences, he gave
 the

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the whole of such real estates to the respondents *John Partridge* the elder, and *Samuel Mare*, to the use of his sister *Ann Salter* the appellant, for her natural life; remainder to the first and other sons of her body successively in tail male; remainder to the respondent *Hannah Salter Ashe*, the testator's wife, for her natural life; and after her decease, to remain to her issue in tail, in such manner as he had limited the same to his said sister *Ann Salter*, with remainder to the respondent *Margaret Salter*, in the same manner; and for default of such issue, then the testator devised all his said estates to the respondent *Jane Ramsey*, daughter of the respondent *Francis Hite*, (by her then name and description of *Jane Byrdall* of *Crediton* aforesaid, widow of *John Byrdall* late of *St. Mary Church* in the same county, surgeon, deceased) and to the heirs of her body; with remainder to the said *Jane Byrdall*, her heirs and assigns for ever. Then followed a proviso, whereby the testator declared his will to be, that his trustees, after payment of the said several annuities, should receive and take all the overplus rents and profits of his estates, and pay the same into the hands of his said sister *Ann Salter*, she being but of a moderate understanding, at four equal quarterly payments; and that the same should not be paid to any other person or persons, who might claim the same by virtue of any bargain, sale or assignment from her, nor into the hands of any person or persons whom she might happen to marry, but only into her own hands during her life, whether she should be sole or covert; and so as that such husband might not have any thing to do therewith. The testator then gave the residue of his personal estate to the respondents *John Partridge* the elder, and *John Partridge* the younger, to be by them disposed of and applied towards the payment of his debts, legacies, and funeral expences, and appointed them executors of his will.

After this will was executed, it was inclosed and sealed up in an envelope or cover: And before the testator left the inn, he was under some difficulty what he should do with his will, expressing his fear, that if he should carry it home with him, it might come to the knowledge or custody of his wife, which he was anxious to prevent. Whereupon *Josias Salter* his brother-in-law, advised him to deposit the will in the hands of one of his friends; and accordingly the testator, very soon afterwards, deposited the same in the hands of one *Susannah Franks*, request-

ing her to lock it up safely in her box, till he should call for it again; and in case of his death, in the mean time, to deliver it to the respondent *John Partridge* the elder.

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It happened, that the testator survived all the three subscribing witnesses to his will, and yet it did not appear, that he ever paid any regard to that circumstance; for he never called upon Mrs. *Franks* for a re-delivery of the will, nor took any other notice of it, than by occasionally declaring to some of his particular and intimate acquaintance, that he had made a will, or (to use his own expression) settled his mind.

On the 14th of *August* 1767, the testator died without issue; leaving the appellant his only sister and heir at law, and the respondent *Hannah Salter Ashe* his widow; and in the course of that month, *Susannah Franks*, in compliance with the testator's request, delivered his will to the respondent *John Partridge* the elder, without having at any time before parted with it out of her custody.

Upon the envelope or cover, in which this will was inclosed, were written these words, viz. "This will not to be opened till three months after the death of Mr. *Salter Ashe*." This indorsement was of the same hand writing with the body of the will itself; but was inconsistent with the testator's direction in the very beginning of his will, touching the manner of his interment; which certainly escaped attention at the time of writing the indorsement: However, Mr. *Partridge*, utterly unacquainted with the contents of the will, and governed by the words of the indorsement on the envelope, kept it by him till the three months from the testator's death were nearly expired; and then delivered it to his son, the respondent *John Partridge* the younger, directing him to carry it to the respondent *Francis Hite*, who he knew was the attorney and intimate acquaintance and friend of the family. As soon as *John Partridge* came to Mr. *Hite*'s house, and before he delivered the parcel to him, he thought proper to send a message to Mrs. *Ashe*, the testator's widow, informing her, that he had something which he believed belonged to the family, and desiring to know whether he should wait on her, or whether she would come to him; to which message Mrs. *Ashe* returned for answer, that she would soon be at Mr. *Hite*'s house.

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Accordingly, in about a quarter of an hour afterwards, Mrs. *Ashe*, together with her cousin the respondent *William Salter*, and her sister-in-law *Ann Salter*, the appellant, came to the house of the respondent *Francis Hite*; when, and not before, Mr. *Partridge* junior took the parcel out of his pocket, and delivered it to Mr. *Hite*; saying, that he had received it from his father, the respondent *John Partridge* the elder, and imagined it to be the will of Mr. *Michael Salter Ashe*; and being then about to leave the room, Mrs. *Ashe* desired him to stay and hear the will read; saying, it was very likely there was some thing in it which concerned him, or his father, because he had the keeping of it. Mr. *Hite* then proceeded, at the request of Mrs. *Ashe* to open the will, and read it; but before he had gone far in such reading, he was interrupted by Mrs. *Ashe*, who flew into a violent passion, denying it to be her husband's will, or that the signature thereunto set was of his handwriting; and after behaving in an outrageous manner for near half an hour, she left Mr. *Hite's* house, and the will in his custody.

On the 13th of *January* 1768, the respondents *Francis Hite* and *Jane Ramsey* (by her then name of *Jane Byrdall*) exhibited their bill in the Court of Chancery, against the appellant, as the testator's heir at law, and also against the other respondents, praying, that the testator's will might be established, and the several trusts thereof performed and carried into execution.

But before any of the defendants had answered this bill, *viz.* on the 18th of *April* 1768, the appellant filed her cross bill against the respondents; praying, that an issue at law might be directed, to try the validity of the will.

These causes being at issue, and several witnesses having been examined on both sides, came on to be heard on the 9th of *July* 1770 before the Master of the rolls; when his Honour was pleased to order, that the parties should proceed to a trial at law, at the then next *Lent* assizes to be holden for the county of *Devon*, on the following issue, *deviseavit vel non?* and the consideration of costs, and all further directions, were reserved until after such trial should be had.

This issue was accordingly tried at the *Lent* assizes 1771, and a special jury was struck and summoned on that occasion, at the instance

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instance of the appellant, but only three of the special jurymen being then present, the Court, as is usual in the like cases, ordered the panel to be compleated by talesmen. And during the course of this trial, which lasted fourteen hours, a great number of witnesses were examined both for and against the will, who spoke nearly to the same effect, as they had before deposed to, upon their examination in the Court of Chancery

The substance of the evidence, attempted to be given against the will, was, 1st, Certain declarations, alledged to have been made by the testator subsequent to the date of his will, and down to very near the time of his death, that he had made no will, but intended to make one so soon as he could settle his accounts with the respondent *Francis Hite*. 2d, That the testator's name, and the names of the witnesses, *Matthew Andrew Paul*, *Josias Salter* and *Elizabeth Caunter*, were not like their usual manner of handwriting. 3d, That Mr. *Paul* had never been employed by the testator in any of his affairs, nor could any draft of the will be found amongst Mr. *Paul's* papers, neither was there any entry in his books, of any charge made against, or sum of money received from the testator for making his will. 4th, That the will itself was not of the handwriting of Mr. *Paul*, or any of his known clerks. And 5th, That the witnesses *Josias Salter* and *Elizabeth Caunter* were both at their respective habitations in *Crediton*, and in a declining and dangerous state of health, at the time when the will was supposed to have been attested by them at *Exeter*, which, according to the evidence for the will, was on the 6th or 7th of *August*.

The evidence adduced in support of the will, was 1st, An application made by the testator to Mr. *Mare*, a man of fortune and reputation in *Crediton*, in the month of *July*, 1766, to permit the testator to make use of his name as a trustee in his will; and that about a month or five weeks afterwards, the testator informed Mr. *Mare*, of his having made that use of his name, and expressed his satisfaction at having made his will, for that now his family would be settled. 2d, The positive testimony of twelve witnesses, to the respective hands writing of the testator, and of the three subscribing witnesses to his will; and the like testimony of nine witnesses, to the testator's sanity, both before and after the date of the will, and home to within a few days of his

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his death. 3d, The particular account given by *John Vicars*, the master of the *Turk's-head* Inn at *Exeter*, of the execution of the will in the presence of all the three witnesses at his house; who deposed, That during *Lammas* fair, which began on *Tuesday* the 5th, and ended on *Thursday* the 7th of *August*, 1766, between two and three of the clock in the afternoon, (and as he thought the second or third day of the fair,) the testator, together with Mr. *Paul* and *Josias Salter*, came to the witness's house, and asked for a room to do business in: That the witness thereupon shewed them up stairs into his dining room; and whilst he was turning up the leaf of the table to accommodate them, he saw Mr. *Paul* take a paper parcel (describing the envelope or cover) out of his pocket, and take a parchment out of the parcel. That the witness then went down stairs, and immediately afterwards *Elizabeth Caunter* came to the house, enquiring whether Mr. *Ashe* and Mr. *Josias Salter* were there; and being answered by the witness in the affirmative, was by him shewn into the said dining room. That soon afterwards the bell of that room being rung, the witness went up and received orders to make a tankard of negus; and that Mr. *Paul* was then reading a parchment writing, which by some words that the witness heard he apprehended to be a will. That the witness after having made the negus carried it up, when he saw the testator, and the three other persons, all sitting at the table, and Mr. *Paul* writing on the back of the parchment. That the witness after having set down the negus immediately left the room; and after some short time, was called up again, and ordered to bring a candle, which he accordingly did. That soon afterwards, Mr. *Paul* came down stairs and went away, and was in a little time followed by *Elizabeth Caunter*, who likewise went away. That thereupon the witness went up into the dining room, and was desired by the testator and *Josias Salter*, to drink some negus with them, which he did; and then saw the same parcel lie on the table, which being taken up by *Josias Salter*, the witness saw that it was sealed; and *Josias Salter* holding it in his hand, said, "There was the thing which he had so long been uneasy about, and so willing to have done; that it was *Michael's* will, and that he had now settled all things to his mind." 4th, The testimony of two other witnesses, who positively swore to their having seen and conversed with *Josias Salter* and *Elizabeth Caunter*, at *Exeter*, in the beginning of *August*, 1766, during the fair; and to their being informed by them,

them, that they had been with the testator upon business concerning his will; and the testimony of two persons, to seeing the testator and the subscribing witnesses to his will at the *Turk's-head*, at the time of the supposed execution of it, as deposed by *John Vicars*. And 5th, The concurrent evidence of a great number of witnesses, who all swore to the long and particular intimacy and friendship between the testator and the respondent *Hite*, and to repeated declarations of the testator of his great obligations to Mr. *Hite*, and that he should have starved but for his assistance; and that he was determined to make him satisfaction for the favours he had received, whenever it should be in his power.

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Upon this evidence, the jury, after having withdrawn for a few minutes, brought in their verdict in favour of the will. In consequence whereof, and of the great contrariety in the evidence, the appellant, in *Easter Term 1771*, applied by motion to the Court of Chancery, for a new trial of the former issue; and after much argument on both sides, the Lord Chancellor *Bathurst*, on the 9th of *July, 1771*, was pleased to refuse the motion; declaring, that both himself, and the learned Judge who tried the cause, were perfectly satisfied with the verdict.

From this order the heir at law appealed, insisting, that her title as heir at law being clear and incontestible, ought to prevail against the doubtful title of a devisee, who would alter the course of descent. That Courts of Equity have often directed new trials in suspicious cases, where fraud or forgery is imputed to a will, as in the present instance, and the verdict has not been satisfactory; and a further discussion has often contributed to the suppression of fraud, and the furtherance of justice. That at a second trial of this issue, the books of *Paul* might be produced regularly in evidence, the want of which was urged to the jury. The evidence adduced on the part of the appellant was clear, uniform and consistent; but the respondents evidence teemed with absurdities, inconsistencies and contradictions: The balance of evidence however, clearly preponderated in favour of the appellant. The clear and positive proof, that *Elizabeth Caunter* was at *Crediton* during the fair week; the great improbability, or rather impossibility of *Josias Salter's* being pre-

J. Mansfield.
J. Glynn.

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sent at the *Turk's-head* Inn, on the day of the supposed execution of the will; the negative proof that *Paul* never made the will; the several declarations of *Elizabeth Caunter*; the internal evidence of the will itself; and the indorsement on the cover; all uniformly concurred in demonstrating this proposition, that the pretended will was never executed by *Michael Salter Ashe*, nor drawn by *Matthew Andrew Paul*, nor attested by any of the persons whose names were set thereto as subscribing witnesses. The only ground on which it was contended that the will ought to be established, was, that otherwise several witnesses produced by the respondent *Jane Ramsey*, must be deemed guilty of perjury; but it was equally clear on the other hand, that if the will was to be established, several witnesses produced by the appellant must be deemed guilty of perjury; it being impossible, on any supposition, to reconcile their testimony to the case insisted on, and attempted to be proved by the respondents. The respondents ought not therefore to prevail, unless the circumstances of the case afforded some reason for casting the imputation of perjury on the witnesses for the appellant, rather than on those for the respondents; but this was so far from being the case, that the testimony of the former was confirmed by a great variety of circumstances, all of them wonderfully concurring with great peculiarity and force to disprove the pretended will; and such indeed were these circumstances, that it was scarce possible to believe this will to be genuine, without believing facts to have existed in the present case, which never before existed in any human transaction. The facts given in evidence during the course of this trial, were exceedingly complicated, numerous, and inconsistent with each other; and the discussion of them was only proper for gentlemen, whose improved education and superior knowledge, qualify them for determining on matters of extreme intricacy and difficulty. But at the trial, only three special jurymen were sworn; so that this cause had not received the most satisfactory trial of which it was capable, and which it was the desire of the appellant in praying, and of the Court in granting a special jury, that it should receive. It was therefore hoped, that the order complained of would be reversed, and a new trial granted.

E. Thurlow.
W. Davy.
J. Burland.
J. Brown.

On the other side it was contended, that the application for a new trial, could not be supported on any of the grounds, on which

which Courts of Equity have usually granted new trials. No new evidence having been discovered or expected, which was not, or could not have been made use of on the former trial. No charge of partiality brought against the jurors impannelled on that trial. No imputation thrown on the conduct of the learned Judge who tried the cause. Nor any pretence made, that the conscience of the Court by whom the issue was directed, and for whose information all such issues are directed, remained unsatisfied. That this was not the case of a disinherited heir at law; nor of a will made for the benefit of strangers, in preference to a man's own family and kindred; nor did there appear any circumstances of fraud, imposition, or surprise upon the testator, about the making or executing his will. That the appellant, by praying an issue to try the validity of this will, was and ought to be concluded by the verdict, which had been found on that issue. For should a new trial be granted, and a contrary verdict found, would it be said, that the respondents would be absolutely bound by that verdict, and denied the benefit of a third trial? And if not, it would be difficult to draw the line in any case of this nature, or to say when, and by what means, the fatigue and expence of litigations upon contested wills should have an end. It was therefore hoped, that the order would be affirmed, and no new trial in this case granted.

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After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the order therein complained of should be affirmed, with the following addition; viz. "That the parties do proceed to another trial, at the next Summer Assizes for the county of *Devon*, upon the same issue: And it is further ORDERED, that the respondents be plaintiffs at law, and that the appellant be defendant, who is forthwith to name an attorney to accept a declaration, appear and plead to issue. And it is further ORDERED, that the appellant do pay the respondents their costs of the former trial. And it is further ORDERED, that the Court of Chancery do give all necessary directions for carrying this judgment into execution."

ORDER varied.
M. S. Jour.
sub anno
1773.
p. 276.

Sir

Case 2. Sir *Thomas Broughton*, Bart. and *Delves* } Appellants.
Broughton an Infant, his eldest Son, }

Henry Errington, Esq; and *Mary* his } Respondents.
 Wife, late Widow and Relict of Sir }
Brian Broughton Delves, Bart. de- }
 ceased, and *Thomas Hill*, Esq; }

8th March, 1773.

BY articles entered into previous to the marriage of the respondent *Mary*, with Sir *Brian Broughton Delves*, dated the 30th of *August*, 1762, and made between Sir *Brian* of the one part, and the respondent *Thomas Hill*, and the respondent *Mary*, then *Mary Hill*, spinster, his daughter, of the other part; Sir *Brian* for himself, his heirs, executors and administrators, covenanted with the respondent *Thomas Hill*, his executors and administrators, in consideration of the marriage then intended, and of 10,000 *l.* the marriage portion of the respondent *Mary*, that Sir *Brian* and all others claiming any estate or interest in the manors, messuages, lands, tenements and hereditaments therein mentioned, would within three months after the marriage, at the costs of Sir *Brian*, by such conveyances and assurances as the counsel of the respondent *Thomas Hill*, his executors or administrators, should advise, grant, convey and assure, free from incumbrances, (except an annuity of 1000 *l.* a year, then issuing and payable out of some part of the premises to Dame *Mary*, the mother of Sir *Brian*, and then the wife of *Humphry Mackworth Praed*, Esq; for her life) to such person and persons and their heirs, as should be nominated by Sir *Brian* and the respondent *Thomas Hill* to be trustees, the several manors, messuages, lands, tenements and hereditaments of Sir *Brian*, in the county of *Chester*, with their appurtenances, to the uses following: viz. As to so much and such part of the premises as should be agreed upon by Sir *Brian* and the respondent *Thomas Hill*, and should be of the yearly value of 400 *l.* and in default of such agreement, as to the whole of the premises, to the use of such other trustees, their executors and administrators, as

should

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should be nominated by the respondent *Thomas Hill*, for the term of 99 years, to be computed from the marriage, if Sir *Brian* and the respondent *Mary* should so long live, upon the trusts after mentioned; and after the determination of the said term, and subject thereto, as to the whole of the premises, to the use of Sir *Brian* and his assigns for life, without impeachment of waste; with remainder to trustees to be nominated by Sir *Brian*, upon trust to preserve contingent remainders, but to permit Sir *Brian* to take the rents and profits for his life; and after his death, then to the intent that the respondent *Mary* and her assigns should, if she survived Sir *Brian*, receive out of such part of the premises as should be of the yearly value of 1,600*l.* at least, and should be agreed on by Sir *Brian* and the respondent *Thomas Hill*, and in default of such agreement, out of the whole of the premises, an annuity of 1000*l.* for her jointure, and in bar of dower; payable by two equal payments in every year, on the 29th of *September* and 25th of *March*, the first payment to be made on such of those days, as should next happen after the death of Sir *Brian*, clear of all taxes and outgoings, with power of distress and entry for non-payment as usual; and subject thereto, to the use of trustees, their executors and administrators, to be nominated by the respondent *Thomas Hill*, for a term of 100 years upon trust, for better securing the payment of the said annuity of 1000*l.* and after the determination of that term, and in the mean time subject thereto, to the use of trustees, their executors and administrators, to be nominated by Sir *Brian* and the respondent *Hill*, for 500 years from the death of Sir *Brian*, upon the trusts after declared concerning that term; and upon the determination of the last mentioned term, to the use of the first and other sons of Sir *Brian*, on the body of the respondent *Mary* to be begotten, successively in tail male; and in default of such issue, to the use of Sir *Brian*, his heirs and assigns for ever. And it was agreed, that the term of 99 years was to be upon trust, to raise an annual sum of 300*l.* to be paid to the respondent *Mary*, or her assigns for her separate use, during the joint lives of herself and Sir *Brian*, payable half yearly. And it was declared, that the term of 500 years was to be in trust, for raising such portions for the daughters and younger sons of the marriage, and at such times and in such manner, as in the articles were mentioned. And it was thereby agreed, that in the intended settlement there should be contained a covenant from Sir *Brian*, for indemnifying

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the several premises chargeable with the said annuity of 1000 *l.* to Dame *Mary* his mother, from the payment thereof in prejudice to any of the uses or trusts intended to be limited of the premises by the settlement, subsequent to the estate for life to be limited to Sir *Brian*.

Soon after the execution of these articles, the marriage took effect; and the respondent *Thomas Hill* actually paid Sir *Brian* the 10,000 *l.* agreed to be paid as the marriage portion of the respondent *Mary*; but no settlement was ever executed pursuant to the articles.

Sir *Brian* being seised of an estate in the county of *Lincoln*, did on the 10th of *November* 1763, enter into an agreement to sell the same to *George Forster Tuffnell Esq*; for 27000 *l.* and Sir *Brian* did also about the same time, enter into a contract with the Honourable *Thomas Pitt*, to purchase of him the manor of *Abbots Ann*, in the county of *Southampton*, and several farms and lands there, for 24,000 *l.*; and did also enter into another contract with the heirs at law of *Maynard Guerin, Esq*; and the heirs at law of *Thomas Gatehouse, Esq*; for the purchase of the manor of *Upp-Clatford* and several messuages, lands and hereditaments in *Upp-Clatford*, in the said county of *Southampton*, for 10,000 *l.*

Sir *Brian* having entered into such several contracts, and the purchases not being compleated, and he being seised in fee of several large estates in the counties of *Chester* and *Stafford*, of the yearly value of 8000 *l.* and being also entitled to a very considerable personal estate, including the purchase money to be paid him for his estate in *Lincolnshire*, and being desirous of giving some part of his fortune and estate to the respondent *Mary*, for whom he always expressed a very great affection and regard, over and besides the provision he had made for her by way of jointure by the said articles, and not having any issue, did, while he was of sound and disposing mind and understanding, duly make his will, bearing date the 21st of *May* 1764, and thereby devised and bequeathed to the respondent *Mary*, her heirs, executors and administrators respectively, his dwelling house (being leasehold) in upper *Brook-street*, near *Grosvenor-square*, with the appurtenances; and all such share and interest as at his decease he should be possessed of,

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of, or entitled to, in the public stocks or funds; and all his jewels, trinkets, plate, linen, pictures, china, household goods, and furniture; and all his horses of every kind, and such three of his carriages as she should choose, and all his estate, right, title and interest in the same; to hold to the respondent *Mary*, her heirs, executors and administrators, for her and their own use and benefit. He also devised to the respondent *Mary* and her heirs, for her and their own use and benefit, all the manors, messuages, advowsons, farms, lands, tenements, hereditaments and real estates in the county of *Southampton* (for the purchase whereof he had then contracted) with the appurtenances, and all his right, title and interest in the same, or in lieu thereof, the whole money arising from the sale of all his real estates in the county of *Lincoln*, and such further sums of money as, together with the money arising from such sale, should be sufficient to enable her or her heirs to compleat the several contracts he had made for the purchase of the said estates in the county of *Southampton*, in trust nevertheless to compleat such purchases, and to procure and take conveyances of the same estates, to her and their own use and benefit. He then devised to *Edward Kynaston*, Esq; and *John Chambre*, Esq; their heirs and assigns, all his manors, messuages, advowsons, farms, lands, tenements, tithes, hereditaments, and real estates in the counties of *Stafford* and *Chester*, and all his estate, right, title, and interest in the same, to hold to the said *Edward Kynaston* and *John Chambre*, their heirs and assigns, to the uses following; viz. to the intent, that *Charles Shrimpton* and his assigns, should receive for his life the yearly sum of 20*l.* out of the last mentioned premises, clear of all deductions, payable quarterly, in such manner and with such power of distress for recovery thereof, as in the will were mentioned; and subject thereto, to the use of the appellant *Sir Thomas* (by his then name and description of *Thomas Delves* Esq;) and his assigns for life; and after the determination of that estate, to the use of the same trustees and their heirs, during the life of the appellant *Sir Thomas*, in trust to preserve the contingent uses; and after his decease, to the use of the first and other sons of the body of the appellant *Sir Thomas*, successively in tail male; and in default of such issue, to the use of the testator's cousin, *John Broughton*, and his heirs and assigns for ever. And after giving some pecuniary legacies, he gave and bequeathed all the rest, residue and remainder of his goods, chattels and personal estate, subject to the payment of his just debts and funeral expences, to the

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the appellant *Sir Thomas*, his executors, administrators and assigns, for his and their own use and benefit; and appointed the said *Edward Kynaston* and *John Chambre* executors of his will.

On the 16th of *January* 1766, the testator died without issue, and without having revoked or altered his will, leaving the respondent *Mary* his widow, and the appellant *Sir Thomas* his only brother and heir at law; and soon after his death, the executors of his will duly proved the same, and took upon themselves the execution thereof; and the respondent *Mary* also proved the will in the Court of Chancery, by the subscribing witnesses, in a suit instituted for perpetuating their testimony, against the appellant *Sir Thomas*.

In pursuance of this will, the appellant *Sir Thomas* obtained an act of parliament for taking and using the surname of *Broughton* only, agreeable to the directions of the will, and in other respects submitted to, and acted under the will.

Soon after the testator's death, the respondent *Mary*, with the consent of the appellant *Sir Thomas*, and of the executors, entered upon the estates in the county of *Southampton* devised to her by the will, and possessed herself of the testator's house in upper *Brook-street*, and the several other specific legacies thereby given to her; and the appellant *Sir Thomas* also entered upon the testator's estates in the counties of *Chester* and *Stafford*, under and by virtue of the will.

The appellant *Sir Thomas* likewise applied to parliament, for an act to enable him to cut down timber from off the estates in the counties of *Chester* and *Stafford*, and in his petition for leave to bring in a bill for that purpose stated, that the estates were of the annual value of 8000 *l.* and alledged, as a ground for such application, that they were subject to three jointures, meaning amongst others the said jointure to the respondent *Mary*, one of which afterwards fell in.

The estates and fortune which *Sir Brian* died seised and possessed of were very ample, consisting not only of his said real estates in the counties of *Chester* and *Stafford*, of the annual value beforementioned, but also of a considerable personal estate,
exclusive

exclusive of what he gave to the respondent *Mary*, more than sufficient to pay his debts and legacies.

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The estates in the county of *Southampton*, devised to the respondent *Mary*, were not of more than the gross annual value of 627 *l.* 12 *s.* subject to very large deductions for land tax, repairs and other outgoings, which reduced the same to 550 *l.* per ann. clear: And Sir *Brian* was not at his death entitled to any other stocks or monies in the public funds, than 2000 *l.* *East India* stock.

Sir *Brian* at the time of making his will, had not obtained any conveyance of the estates in the county of *Southampton* or any of them, nor had he paid the purchase money for the same.

The respondents *Henry Errington* and *Mary* his wife, intermarried on the 5th of *August* 1769.

The appellant Sir *Thomas* paid the respondent *Mary* her annuity of 1000 *l.* pursuant to the articles entered into previous to her marriage with Sir *Brian*, from the time of his death to *Michaelmas* 1768; but he afterwards declining to make any further payments of the said annuity, the respondents, in *Hilary* term 1770, filed their bill in the Court of Chancery against the appellants, and also against the said *Edward Kynaston*, *Humphry Mackworth Praed* and *Mary* his wife, and *Charles Shrimpton*, stating the several matters abovementioned, and praying, that the appellant Sir *Thomas* might be decreed to pay the respondents *Henry Errington* and *Mary* his wife, in her right, the arrears of the said annuity of 1000 *l.* and that her marriage articles might be decreed to be specifically performed and carried into execution, so far as the same related to the jointure of the respondent *Mary*, by all persons claiming under Sir *Brian*, and that a proper part of the estate in the county of *Chester*, of the annual value of 1600 *l.* at least, might be set apart and conveyed pursuant to the articles, to the respondent *Thomas Hill*, and such other trustee as the appellant Sir *Thomas* should appoint, in trust for raising and paying the said annuity of 1000 *l.* to the respondent *Mary* during her life, and that until such conveyance should be made, the appellant Sir *Thomas*, and such other persons as should be in the possession of the rents and profits of Sir

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Brian's estates in the county of *Chester*, might make the growing payments of the said annuity.

The appellant *Sir Thomas* put in his answer to this bill, and thereby insisted, that what was given by the will to the respondent *Mary*, was a satisfaction for what she was entitled to under the articles, or that she could not have both provisions; for that it could not be the testator's intention, that the jointure claimed by *Mary* should remain a charge on the *Cheeshire* estate, or be paid therefrom, or that a conveyance should be made of any part thereof pursuant to the articles.

Issue being joined in the cause, divers witnesses were examined on both sides: And on the 28th of *January* 1772, the cause came on to be heard before the Lord Chancellor *Bathurst*, when the deposition of *Mr. Francis Chambre*, who prepared the will of *Sir Brian*, was offered by the respondents to be read on their behalf, to prove the declarations of the testator at the time he gave the instructions for the will to *Mr. Chambre*, with respect to his intention of giving the respondent *Mary* the several devises and bequests to her mentioned in his will, over and above her jointure; but his Lordship did not think fit to admit such evidence to be read; and was pleased to declare, that the respondents were entitled to have the rent charge of 1000 *l.* a year secured, agreeable to the articles dated the 30th of *August* 1762; and decreed that the appellant *Sir Thomas* should pay the arrears thereof then incurred, in six months from that time, and should continue the growing payments thereof half yearly, within three months after each half yearly payment should be due; but in default of his paying such arrears, and continuing such growing payments of the said rent charge, the respondents were to be at liberty to apply to the Court for further directions relating thereto, as they should be advised; and it was further ordered, that the respondents should pay the defendants *Humphry Mackworth Praed* and *Dame Mary* his wife, and the defendant *Edward Kynaston*, their costs of the suit, to be taxed by the Master; and that the appellant *Sir Thomas* should repay to the respondents such costs as they should so pay, and should also pay to the respondents their costs of the suit, to be taxed by the Master; and any of the parties were to be at liberty to apply to the Court, as there should be occasion.

From

From this decree the present appeal was brought; and on behalf of the appellants it was argued, that though a devise, when considered by itself, may carry with it the presumption of an intended bounty, yet when a testator has covenanted by articles, to make a provision for his wife or children, such a presumption is liable to be controuled by a still stronger presumption, that he intended the devise as a satisfaction for the performance of those articles; and especially where the devise is so great in value, as to include both a satisfaction and a bounty. This general presumption, that where two provisions are made for a wife or a child, the testator intended the one to be a satisfaction for the other, (which general presumption is grounded on the known custom of this realm, to give the bulk of the family estate to the eldest son or heir at law, with competent provisions for the wife and younger children) was peculiarly strong in the present case; where, from the heavy charges already laid on the family estate, the only brother and heir would otherwise be unable to maintain the ancient figure and credit of the family. That the lands alone devised by the will, were of much greater value than the rent charge claimed under the articles; and thereby all objections was obviated, which might have arisen from the provision under the will, not being of the same nature with that under the articles. That from the testator's having omitted any mention of the articles, although they must have been present to his memory, while he was securing another rent charge of 20*l.* a year to Mr. *Shrimpton*; and from the manner in which he devised those estates to the appellant Sir *Thomas*, subject to that rent charge, a strong presumption arose, that he considered the devise and bequests to his widow, as an ample satisfaction for the articles. Lastly, that the devise of the estate to Sir *Thomas* for life only, was inconsistent with the claim of the rent charge under the articles; inasmuch as Sir *Thomas*, from the nature of his interest, was incapable of making any legal conveyance of the rent charge so claimed.

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W.W. Pepys.

On the other side it was contended, that every devise or bequest in a will, *prima facie*, imports a bounty; and therefore in order to induce a Court of Equity to consider the bequests in this will in favour of the Lady, as a satisfaction for her jointure of 1000*l.* a year, or as a performance of the marriage articles entered into by Sir *Brian*, it was incumbent upon the appellants to shew, that

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that it was the testator's intention when he made his will, to give her a satisfaction by that will, for or in lieu of her jointure, or to perform the marriage articles on his part; and such intention must appear, either from the express words of the will, or the clear and manifest intention of the testator appearing upon the face of it, or be drawn by necessary implication therefrom; but no such intention or necessary implication appeared in any part of Sir *Brian*'s will, rather the contrary. In order to make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land; or must at least be of such certain and known value and estimation, and so far of the same nature with the thing to be satisfied therewith, as to appear indisputably to be equivalent, or superior, not only in gross value, but in annual income, to the debt or demand, or the thing to be performed; but none of these circumstances attended the devises or bequests, which, in the present case, were contended to be a satisfaction for the respondent *Mary*'s jointure, or a performance of Sir *Brian*'s marriage articles. That the annuity of 1000 *l.* agreed to be settled on her by those articles, was intended as a jointure for her, and was declared to be in bar and satisfaction of dower; and therefore ought, in a Court of Equity, as well as at law, to be considered as coming in the place of dower, and having the same privileges, force and effect, as a right of dower; and neither Courts of Law or Equity admit an averment of a collateral satisfaction for dower. That Sir *Brian*, not having obtained any conveyance of the *Hampshire* estates, or paid the purchase money for them, at the time of making his will, could not devise to the respondent *Mary* the legal interest therein; and therefore the devise to her was in fact a devise of the right to compleat the purchase, and a gift of mere personal estate, or of so much money as he had agreed to give for the purchase of the *Hampshire* estates, and appeared to be so considered by him, from the penning of his will; but a bequest of personal estate cannot be averred to be, or be considered as a satisfaction for a jointure in lands, or a rent charge upon a real estate. That in order to make Sir *Brian*'s will a performance of his marriage articles, it must appear upon the face of it, and at all events, a compleat and full performance thereof, and to have been so intended by him: But the very reverse appeared; for the devise of the *Cheshire* estate in his will, must have been considered by him as subject

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to the articles, or springing out of the ultimate remainder in fee, reserved to him by the articles; and if he had had any son by his lady, such son, as well as the mother, would have been entitled to call for a specific performance of the articles; and the will could not have been set up as a satisfaction thereof against the son, nor could such son have insisted, that the devises and bequests in the will to his mother, were a performance of the articles so far as related to her; nor if a conveyance and settlement of the estate had been actually made and executed pursuant to the articles, could any person entitled under that settlement have set up such devises and bequests to the respondent *Mary* in Sir *Brian*'s will, as a discharge or satisfaction of her incumbrance, or rent charge upon his estate. That if Sir *Brian* had intended to devise his *Cheshire* estate to his brother, and the other devisees in remainder, discharged from his Lady's jointure, he would most probably have expressly declared such intention by his will; as it appeared from many circumstances, that at the time of making this will, he had not forgot, but well remembered, that he had before settled such a jointure on her; and his bequeathing her his house in *Brook Street*, and his plate, furniture, horses and carriages, proved his intention that she should, after his death, live in a manner and at an expence suitable to her rank as his widow, and therefore he must have intended by the devise in question, to increase her jointure, in order to answer that purpose.

After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the decree therein complained of, affirmed.

DECREE affirmed.
M. S. Jour.
sub anno 1773,
P. 315.

John Newton, Esq; Appellant. Case 3.
William Newton and *Robert Lee*, Esqrs; Respondents.

6th May 1773.

BY indentures of lease and release, dated the 1st and 2d of February 1714, between *John Newton* and *Mary* his wife, the widow of *Ewens Messenger*, of the first part; *Mary Messenger*,
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ger, one of the daughters of the said *Mary Newton* by the said *Ewens Messenger*, of the second part; *Brailsford Newton* and *Elizabeth Messenger*, another daughter of the said *Mary Newton* by the said *Ewens Messenger*, of the third part; and Sir *Gervase Clifton*, Bart. *William Norton*, *William Newton* and *Richard Walburge*, of the fourth part; reciting indentures of lease and release, of the 1st and 2d of *April* 1710, between *John Messenger*, eldest son and heir of the said *Ewens Messenger*, of the first part; the said *William Norton* and *William Newton* of the second part; and the said *John Newton* and *Mary* his wife, of the third part; whereby all that messuage or tenement with the appurtenances called *Dolbank*, and other lands and tenements in the county of *York*, were settled and assured, in the first place, for securing the clear yearly sum of 20 *l.* to the said *John Messenger* for his life, and subject thereto, to the use of such person and persons, and his, her and their heirs and assigns, and for such uses, intents and purposes, and under such trusts, limitations and appointments as the said *Mary*, the wife of the said *John Newton*, as well during her coverture with the said *John Newton*, as after his death, should by any deed or deeds, writing or writings, by her executed in the presence of three or more credible witnesses, by herself alone, or jointly with the said *John Newton*, or by her will in writing, limit, direct and appoint; and for want thereof, to the use of the said *Mary Messenger* and *Elizabeth Messenger*, the sisters of the said *John Messenger*, their heirs and assigns, as tenants in common, and not as joint tenants; and also reciting, that a marriage was then intended to be had between the said *Brailsford Newton* and *Elizabeth Messenger*; the said *John Newton* and *Mary* his wife, in consideration thereof, granted and conveyed to the said Sir *Gervase Clifton*, *William Norton*, *William Newton* and *Richard Walburge*, and their heirs, the said messuages, lands and premises called *Dolbank*, and other lands and tenements therein particularly mentioned, to the use of such person or persons, and for such uses, as the said premises then stood limited unto by virtue of any settlement or settlements, deed or deeds then in force, until the said intended marriage between the said *Brailsford Newton* and *Elizabeth Messenger* should take effect; and from and after the solemnization thereof, as to the said messuages called *Dolbank*, and other premises in the county of *York*, to the use of the said *Mary*, the wife of the said *John Newton*, for her life; remainder as to one moiety thereof (subject to
and

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and chargeable with one moiety of the said 20 *l.* a year to the said *John Messenger* for his life), to the use of the said *Mary Messenger* for her life, without impeachment of waste; remainder to trustees to preserve the contingent remainders; remainder to the heirs of the body of the said *Mary Messenger* lawfully to be begotten, and the heirs of the body and bodies of all and every such heirs or issue; remainder to the said *Brailsford Newton* for his life, without impeachment of waste; remainder to the said *Elizabeth Messenger* his intended wife for her life, without impeachment of waste; remainder to the heirs of the body of the said *Elizabeth Messenger* by the said *Brailsford Newton*, lawfully to be begotten, and the heirs of the body or bodies of all and every such heirs or issue lawfully issuing; remainder to the heirs of the body of the said *Brailsford Newton*, on the body of any other wife; remainder to the heirs of the body of the said *Elizabeth Messenger*, by any other husband; remainder to *John Messenger*, of *Fountains*, Esq; his heirs and assigns for ever. And as to the other moiety of the said premises, after the death of the said *Mary Newton* (subject in like manner to the other moiety of the said annuity) to the said *Brailsford Newton* for his life; remainder to the said *Elizabeth Messenger* his intended wife, for her life; remainder to trustees, to preserve the contingent remainders; remainder to the first and other sons of the said *Brailsford Newton* and *Elizabeth Messenger*, severally and successively in tail male; remainder to their daughters in tail, with cross remainders amongst such daughters; remainder to the heirs of the body of the said *Brailsford Newton*, by any other wife; remainder to the heirs of the body of the said *Elizabeth Messenger*, by any other husband; remainder to the said *Mary Messenger* for her life; remainder to trustees, to support the contingent remainders; remainder to the heirs of her body, and the heirs of such issue; remainder to the said *John Messenger* of *Fountains*, his heirs and assigns for ever. In which indenture of release was contained a proviso, enabling the said *John Newton* and *Mary* his wife, *Brailsford Newton* and *Elizabeth* his intended wife, and *Mary Messenger*, with the consent of the trustees, by any deed or deeds in writing, under his, her and their hands and seals, to be by them executed in the presence of three or more credible witnesses, to alter, change, revoke, determine and make void, all and every the use and uses, limitations or estates therein limited, declared, directed and appointed, concerning all and every or any part

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or parts of the said premises. And by the same, or any other deed or deeds, to limit, declare, raise or appoint any new or other use or uses, estate or estates, trust or trusts, concerning the said premises, or any part thereof.

The marriage between the said *Brailsford Newton* and *Elizabeth Messenger*, soon afterwards took effect; and the said *John Messenger*, the son of the said *Mary Newton*, died without issue, leaving his said sisters *Mary* and *Elizabeth* his coheirs.

By indenture quadrupartite, dated the 3d of *April*, 1719, between the said *John Newton* and *Mary* his wife, of the first part; the said *Mary Messenger*, of the second part; *Brailsford Newton*, and *Elizabeth* his wife, of the third part; and *Joshua Blackwell*, *William Percy* and *Robert Newton*, of the fourth part; reciting the aforesaid settlement, and the proviso therein contained, and that the said *John Newton* and *Mary* his wife, *Mary Messenger*, and *Brailsford Newton* and *Elizabeth* his wife, had sold and conveyed all the said premises in the county of *York*, to *Edward Norton*, Esq; for 2,400 *l*; and further reciting, that by the consent and agreement of all the parties, the said 2,400 *l*. was paid to the said *John Newton*, in trust for the respective uses, benefit and advantage of all the parties, proportionably and according to their respective rights and interest in and to the said premises so sold and conveyed, or to any part or parts thereof, according to the several and respective uses and limitations before mentioned, and in the said recited indenture of release contained; and that the said *John Newton*, by the like consent and agreement of all the parties, had laid out and invested 1,200 *l*. part thereof, in the name of the said *William Percy*, in *South-sea* stock, and had paid and lent in the name of the said *Joshua Blackwell*, the further sum of 1,200 *l*. residue of the said 2,400 *l*. unto the said *Sir Gervas Clifton* and *Robert Clifton*, Esq; his son and heir, upon their bond to the said *Joshua Blackwell*, in the penalty of 2,400 *l*. dated the 15th of *December* then last; therefore in pursuance and performance of the trusts reposed as aforesaid, he the said *John Newton* did own, acknowledge, declare and agree, that the said note or transfer of the said capital or principal stock, as also the said bond or obligation, were in the hands or custody of him the said *John Newton*, in trust and for the several uses, benefit and advantage of them the said *John Newton* and *Mary* his wife, *Mary Messenger*, and *Brailsford Newton* and *Elizabeth* his wife, and their

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their heirs, severally, proportionably, and according to the several and respective rights, titles and interests of them, each and every of them, and of their heirs, to the premises so sold and conveyed as aforesaid, or to any part thereof, according to the several and respective uses and limitations therein before mentioned, and in the said recited indenture of release contained, other than and except as to the said *John Messenger of Fountains*: And that the said capital or principal stock in the said *South-sea* company, as also the said bond and obligation, with all the interest, product and advantage thereof, should remain and continue in the hands and custody of the said *John Newton*, as a security as well for the said principal sum of 2,400 *l.* as for the lawful interest to him the said *John Newton* and *Mary* his wife, *Mary Messenger*, and *Brailsford Newton* and *Elizabeth* his wife, and their heirs, severally and respectively, proportionably, and according to such the said several and respective rights, titles and interests of every and each of them and their heirs, to the premises so sold and conveyed as aforesaid, according to the several uses in the said indenture of release contained, other than and except as to the said *John Messenger of Fountains*. And the said *John Newton* did thereby covenant, that at any time afterwards, at the request of the parties interested, he would deliver up to the said *Blackwell Percy* and *Robert Newton*, the said *South-sea* stock and bond, in trust for the several uses, benefit and advantage of them, the said *Mary Messenger*, and *Brailsford Newton* and *Elizabeth* his wife, and their heirs severally, respectively, proportionably, and according to their several and respective rights and interests aforesaid; and that so long as the said *South-sea* stock and bond, or any part thereof, should continue in his hands, he the said *John Newton*, his executors, administrators and assigns, should pay to the said *Mary* his wife, *Mary Messenger*, and *Brailsford Newton* and *Elizabeth* his wife, the interest thereof for their several and respective benefit and advantage, and according to their said several and respective rights and interests.

The said sum of 2,400 *l.* was not laid out in the purchase of other lands and tenements and settled to the same uses, as it ought to have been, but continued several years in the hands of *John Newton*, who in the year 1729, delivered over to the said *Mary Messenger*, divers securities for money, to the amount, not

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only of her share of the purchase money received by him for the *Yorkshire* estate, but also of other her demands on him; in consideration of her depositing sufficient of such securities to answer the contingent demands of her sister *Elizabeth*, the wife of the said *Brailsford Newton* and her issue, of the said 1,200 *l.* in case of the said *Mary Messenger*'s dying without issue; upon which occasion he took her discharge for the same, in the words following: viz. "November the 10th, 1729, I, *Mary Messenger*, do hereby acknowledge to have received of my father-in-law, Mr. *John Newton*, one mortgage for 1000 *l.* made by Mr. *Meymotte*, &c. to Mr. *Joseph Farmery*, and also one other mortgage for 300 *l.* made by Mrs. *Riley* to the said *Joseph Farmery*, and also one bond for 300 *l.* made by the said *Joseph Farmery* to the said *John Newton*, and also one other bond for 100 *l.* by Mr. *Tomlinson*, &c. to *Peter Brown*, and assigned to the said *John Newton*, all which sums make together the sum of 1,700 *l.* and is in full discharge and satisfaction, as well of the portion given me by my late father Mr. *Ewens Messenger*, as also of 1,200 *l.* being one moiety of the purchase money of *Dolbank*, to which I am entitled, as is set forth in a deed bearing the date the 3d day of *April*, 1719, and which said 1,200 *l.* in case I should happen to die without issue, is then to be and remain to my sister *Elizabeth Newton*, and her heirs; and for the better securing to them of their said contingency in the said 1,200 *l.* I have agreed to deposit security of equal value in the hands of Mr. *George Bishop*, to be kept by him for my use, as also for securing the contingent use of the said 1,200 *l.* according to the intent and meaning of the before mentioned deed: I say received of the aforesaid *John Newton*, the above mentioned securities, as well in full of my aforesaid claims, as also of all other debts and demands. Witness my hand, *Mary Messenger*."

John Newton by his will, dated the 9th of *October*, 1728, taking notice, that his wife *Mary*, and his son *Brailsford Newton* were both dead, and after giving several pecuniary legacies to *Elizabeth*, then the widow of the said *Brailsford Newton*, declared his will to be, that she the said *Elizabeth* should accept the same, in lieu of all her demands under the said settlement of *Dolbank*, and that she should release to her eldest son the appellant, all her contingent right, title or claim, which she then

then had or might have to 1,200*l.* one moiety of the purchase money of *Dolbank*, and which might come to her in case she should happen to survive her sister *Mary Messenger*, and her said sister should die without issue; and he thereby appointed the said *Robert Newton*, who was a trustee in the deed of the 3d of *April*, 1719, executor of his will; who proved the same, and possessed his personal estate more than sufficient to pay all his debts.

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Pursuant to this will, the said *Elizabeth Newton*, by indenture dated the 4th of *May*, 1733, fully and absolutely gave up, granted and released, to the appellant her eldest son, his heirs, executors, administrators and assigns, all her then as well as contingent right, title, interest, property, claim and demand whatsoever both at law and in equity, to the said sums of 1,200*l.* and 1,200*l.* making together 2,400*l.* the purchase money for the said estate at *Dolbank*. Some time afterwards *Elizabeth Newton* died, leaving the appellant her heir, and several other children.

In *May*, 1768, the said *Mary Messenger* died without issue, and never was married, and left the appellant her nephew and heir; she continued in possession of the said 1,200*l.* as her moiety of the purchase money of the said estate called *Dolbank*, till her death; and she deemed and looked upon the same as real estate, and to be laid out in the purchase of freehold lands and tenements to be settled as aforesaid, and under that apprehension, she, in the year 1752, wrote and sent the following letter to the appellant, *viz.*

“ My dear Jack,

“ As there is 1,200*l.* part of my fortune which comes to you
 “ at my death, which is upon securities, and the people that have
 “ it live at a great distance, makes it very difficult and trouble-
 “ some for me to get the interest paid, and having had the truly
 “ great misfortune to lose my dear friend, who was so good to
 “ take that trouble off my hand; therefore I think proper to
 “ make this proposal to you, which is, that you will take upon
 “ yourself the management of those affairs, by taking in those
 “ securities, which I shall be ready to deliver up to you, upon
 “ your giving me a security to pay me 60*l.* a year for life,
 “ which

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“ which will not only save me great deal of trouble, but be of
 “ advantage to you. For as it is uncertain when I shall end my
 “ days, it will prevent those things falling into any hands but
 “ your own. *Sixbills, 2d September, 1752.*”

The said *Mary Messenger*, shortly before her death made her will, and thereby gave several pecuniary and specific legacies to several persons, without taking the least notice therein of her right or interest in the said 1,200 *l.* as her moiety of the purchase money of *Dolbank*; and she thereby gave to the said *Robert Newton*, the trustee named in the said deed of the 3d of *April* 1719, and to whom the respondents were executors, all the rest and residue of her personal estate, without taking any notice of the children of her late sister *Elizabeth*, and appointed the said *Robert Newton* executor thereof; who proved the same, and possessed all her personal estate to the value of 5,000 *l.* and upwards, and applied the same to his own use, though he was not in any degree of kindred to the said *Mary Messenger*.

The appellant, as the heir of the said *Mary Messenger*, or under the said letter of the 2d of *September* 1752, or otherwise, being well entitled to the said sum of 1,200 *l.* or to have the same laid out and invested in the purchase of freehold lands and tenements to be settled in the manner aforesaid, and to have the interest for the same from the death of the said *Mary Messenger*, he several times applied to the said *Robert Newton* for the payment thereof, but without effect; and therefore in *September*, 1770, the appellant exhibited his bill in the Court of Chancery against the said *Robert Newton*, praying, that he might account with the appellant for the said sum of 2,400 *l.* with interest for the same from the death of the said *Mary*, the wife of the said *John Newton*, and that the said sum of 2,400 *l.* might be laid out and vested in the purchase of freehold lands and tenements, and that such lands and tenements, when purchased, might be settled, conveyed and assured upon, and to and for such uses and estates, and with such limitations, as the lands and tenements so sold and conveyed to the said *Edward Norton* as aforesaid, at the time of such sale were, and stood settled and assured, or as near the same as by the deaths of parties and other accidents might be done; and that the trusts relating thereto
 might

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might be performed and carried into execution, and that the appellant might be paid the interest of one moiety of the said 2,400*l.* to the time of the death of the said *Mary Messenger*, and the interest of the whole thereof from her death to the time when the same should be so laid out and invested in the purchase of freehold lands and tenements; and that in the mean time the said sum of 2,400*l.* might be paid into Court, and placed out at interest, for the benefit and security of the parties entitled thereto.

But before the said *Robert Newton* had answered this bill, he died, whereby the suit abated; whereupon the appellant exhibited his bill of revivor against *William Newton* and *Robert Lee*, the now respondents, as executors of the said *Robert Newton*, to revive the suit; and they having appeared, put in their answers to the original bill, and also to the said bill of revivor, and thereby insisted, that they were entitled to the said 1,200*l.* as part of the personal estate of the said *Mary Messenger* at her death.

The cause being at issue, and several witnesses examined on the part of the appellant, came on to be heard before the Lord Chancellor *Bathurst*, on the 18th of *July* 1772, when his Lordship was pleased to order, that the appellant's said bill should stand dismissed, without costs.

From this decree of dismissal, the appellant appealed; insisting, that it was never contended on his behalf, that money or personal estate could, generally speaking, acquire the descendible or intailable qualities of land, or real estate; for it had been all along admitted, that when land is converted into money, it becomes personal estate, and when money is converted into land, it becomes real estate: But then it is likewise a rule, that when money is previously agreed to be turned into land, it from thenceforth acquires the nature and quality of land, as when land is agreed to be sold and turned into money, such land, from the time of the agreement, is to be considered as money, or personal estate. It is true, that in this case there was landed estate, *viz.* the *Dolbank* estate, turned by a sale into money; but to rely on that single circumstance was fallacious, it being natural to suppose, and there were footsteps of it, that there was another circumstance, either previous to, or in a manner concomitant

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A. Wedderburn.

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with the sale; *i. e.* that there was an express agreement among the parties, that the money which should arise by the sale, should again be vested in a new purchase of other lands, to be settled as the *Dolbank* estate had stood settled, under the settlement of 1714; and in the mean time, the money was to be deposited in the hands of a trustee, to place it out at interest on securities. The transaction relative to the depositing the money arising from this sale, must have been the consequence of some previous negotiation and agreement touching such purchase money; and if it was not a part of that agreement, that the money was not again to be invested in the purchase of new lands, there would not be any way left to make the declaration of trust of 1719, in any shape reconcileable to sense or reason but its whole tendency must necessarily be, to lead all parties into error and misapprehension as to their rights and interests in that property, which came to them in exchange for the *Dolbank* estate. There certainly did exist, though their whole contents did not now appear, several deeds and instruments, at the time, or previous to the completing the sale of this estate; for the uses of the settlement of 1714, must, pursuant to the power of revocation in that deed, be revoked by some deed or instrument, working as an actual revocation, or by some deed or conveyance, working as an implied, or constructive revocation. In the first case, the uses of the settlement of 1714, as to the *Dolbank* estate, must have been by such deed or instrument expressly repealed and made void; and the trustees of that settlement must have been directed to stand seised of that estate, to the use of some new trustee, upon trust to sell and convey the same to Mr. *Norton*; and it was very probable, that it might be there declared or agreed, that the purchase money should be again laid out in the purchase of new lands, to be settled to the uses of the deed of 1714; and that in the mean time, such purchase money should be deposited in the hands of Mr. *John Newton*, in trust, until a new purchase could be found, that he should lay out the same on securities at interest, or in the public funds, and pay the interest and annual profits arising thereby, to such persons as, under the settlement of 1714, would from time to time have been entitled to the rents of *Dolbank*, if no sale thereof had been made. But if there was no such express instrument of revocation, then there must have been some actual conveyance of *Dolbank* to Mr. *Norton*, which must necessarily have operated

operated so as to amount to an implied revocation ; and that conveyance might have in it some recital or expression, demonstrating that it was only meant to vest the fee simple of the *Dolbank* estate in Mr. *Norton* as a purchaser, but not to make the purchase money become personal estate ; it being to be again invested in a new purchase, and in the mean time deposited in the hands of a trustee, there to remain in the nature of real estate, for the benefit of the claimants, under the uses of the settlement of 1714. That every possible endeavour had been used to get a sight of the deeds executed upon the sale of this estate to Mr. *Norton*, but without success, as purchasers are constantly unwilling to produce their purchase deeds ; and therefore, after this length of time, the case must be judged of from the nature and circumstances of the whole transaction ; and it was apprehended, that there were grounds more than sufficient to form a presumption, that there was an actual agreement among the parties, that the sale to Mr. *Norton* was not made with an intention of turning landed property into money, but only to make him proprietor of the *Dolbank* estate ; yet so as that his purchase money should ultimately be again turned into land or real estate, and to hinder it from lying dead in the hands of a trustee, it should be placed out at interest upon securities, until a new purchase could be had.

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This presumption, it was said, was much enforced by carefully attending to the contents of the deed of 1719 ; which naturally presupposed, that upon the transaction with Mr. *Norton*, there was some such revocation, either express or implied, with some such agreement to invest, at some time or other, the money arising from the sale, in the purchase of other lands, in some such manner as before mentioned. For 1st, there was a recital, *that the Nortons and the Messengers had sold and conveyed Dolbank estate to Mr. Norton, for 2,400 l.* Here was an express reference to some conveyance, for a price certain, which necessarily implied that some revocation did precede or accompany that conveyance, or that it worked as a revocation of itself ; but neither the conveyance or the revocation now appeared. 2^{dly}, The recital proceeded by saying, *that by the consent and agreement of all the parties, the said 2,400 l. was paid to the trustee Mr. John Newton, in trust for the respective uses, benefit and advantage of all parties, proportionably, and according to their respective rights and interests in and to the said premises so sold and conveyed, according to the respective uses*
and

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and limitations contained in the said settlement of 1714. Here again there was an express reference to an agreement among the parties, whereby they stipulated, that the transaction upon the sale to Mr. Norton should work no alteration in the rights or interests of the claimants under the settlement of 1714, but that the whole of such rights should remain in the same plight as they had subsisted under that settlement; and this again implied, that it must have been part of the agreement, (the contents of which must now be taken from presumption and conjecture) that ultimately new lands should be acquired, out of which the same rights and interests might be derived, as had subsisted upon the *Dolbank* estate under the settlement of 1714; the several words, *heirs, uses and limitations*, pointing to rights and interests to be derived out of lands, or real estates, which only are capable of descending to an heir. Since the statute of *Hen. VIII.* to speak of uses with respect to money or personal estate, is to speak with great inaccuracy: Uses are not now applicable to personal estates, they can be nothing but trusts: Uses under that statute must necessarily be derived from the seisin of some cognizee, feoffee, releasee, &c. and this seisin can be of nothing but lands; neither did any use arise under the settlement of 1714, but out of lands, *viz.* the *Dolbank* estate; and therefore the uses stipulated for in the agreement here referred to, must be uses derived out of lands; from whence it follows, that it was a necessary part of the agreement, that new lands should be purchased out of which those uses might be derived. 3dly, The deed itself proceeded by witnessing, *that the said John Newton, the trustee, did thereby acknowledge and declare, that he had received the said consideration money of 2,400 l. and that it was deposited in his hands in trust and for the several uses, benefit and advantage of them the said John Newton and Mary his wife, Mary Messenger, and Brailsford Newton and Elizabeth his wife, and their heirs, severally, proportionably, and according to the several and respective rights, titles and interests of them, each and every of them, and of their heirs to the same premises so sold and conveyed as aforesaid, or to any part thereof, according to the several and respective uses and limitations herein before mentioned, and in the said recited indenture of settlement contained.* Here again there was a reference made to an actual deposit of the purchase money, and it named the trustee into whose hands the deposit was made, which necessarily implied an antecedent agreement for such deposit in the hands of
such

such trustee; and then it mentioned for whose use and benefit the deposit was made, *i. e.* the claimants under the settlement of 1714, and their heirs, severally, proportionably, &c. Here the same arguments and inferences recurred with respect to the words *uses, limitations, rights and interests*, as had before been made use of. But how could these claimants and their heirs be secured of having the like rights, benefits and interests in this money, which was the price of the *Dolbank* estate, according to the several and respective rights, titles and interests which they had in that estate under the settlement of 1714, unless it was part of the agreement, that the trustee in whose hands it was deposited, should ultimately lay it out in a new purchase? And to make them talk or intend otherwise, was to make them talk the most absurd language that ever was made use of. Here were the plain footsteps of a farther agreement, it was actually referred to in the recitals of the deed of trust, but its contents were there mentioned in an abridged form; and though it might now in that abridged form, appear somewhat obscure, yet to uphold the intention and meaning of the parties, a Court of Equity, in the matter of a trust, will supply what is wanted, by intendment; and presume, that amongst the contents of this agreement, there were those stipulations which were absolutely necessary to give effect to the true meaning of the parties. *Quod necessario subintelligetur non de est.*

On the other side it was contended, that by the sale of the estate in question, which was effected by means of the powers reserved to the parties, by the settlement of 1714, and in the execution of which they all concurred, the lands were by the consent of all the parties, converted into money; which was paid into the hands of a trustee, and laid out by him, one moiety in *South Sea* stock, and the other moiety on a private security, by the consent of all parties. That the declaration of trust in 1719, considered the trust fund as consisting specifically of the *South Sea* Stock, and the private security; and declared the trust of the specific sums so secured, with a covenant from the trustee to apply the stock and bond according to the trust before declared. That to re-convert the money into land, the consent of all the parties to the declaration of trust was necessary; but no such consent being had, nor any intimation given by any of the parties, that the fund or any part of it should be again converted

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into land, it was therefore to be considered at this time as personal property; and *Mary Messenger* being tenant in tail of one moiety, the remainders over were by the rules of law void; so that she became entitled to the absolute interest in that moiety, and consequently it became part of her personal estate, and passed as such to her executors.

As to the objection, that *Mary Messenger* intended, that *John Newton* should have her 1200*l.* after her death, of which intent her letter was evidence; it was said, that this letter demonstrated that she looked upon the 1200*l.* as money and not as land, and therefore was conclusive against the appellant's relief upon that ground; and the letter did not entitle him to relief upon any other, for it did not import a gift of the money to him. The utmost to be inferred from the letter was, that she understood the appellant would be entitled after her death, and therefore she proposed to him to take the money, and pay her an annuity for her life. But this proposal was founded upon a mistake of her interest. It never was accepted, nor was she ever undeceived; and being founded in error, no right could accrue from it. If she had been undeceived, it was impossible to say what would then have been her intent, or to whom she would have given the benefit of this money. There was therefore no ground whatsoever, upon which the Court could decree any right in the appellant; so that the bill was very properly dismissed.

DECREE
reversed.
M. S. Jour.
sub anno 1773.
p. 662.

But after hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed: And it was DECLARED, that the appellant was entitled to the 1200*l.* in the pleadings mentioned. And it was further ORDERED and ADJUDGED, that the respondents should pay to the appellant 1200*l.* with interest for the same, after the rate of 4*l. per cent.* from the death of *Mary Messenger*; and that the Court of Chancery should give all necessary and proper directions, for carrying this judgment into execution.

N. B. in Mr. Butler's Mss. note of this case when before the Lords, it is mentioned, that Lord Camden made a long speech, in which he reflected on the reasons at the end of the printed case as negatory frivolous & vexatious; but that it appearing to his Lordship, that M. Messenger under the settlement of 1714 was only tenant for life, he moved, that the decree of Lord William Chancellor Bathurst should be reversed, which was accordingly carried in the affirmative.

William Bolts, Esq; - - Appellant. Case 4.

His Majesty's *Attorney General*, at the }
relation of the *East India Company*, } Respondents.

12th May 1773.

BY several letters patent, and by several statutes confirming the same, and particularly by an act passed in the 9th year of King *William III.* and by letters patent, dated the 5th of *September*, in the 10th year of his reign, the sole trade in, to and from the *East Indies*, in the countries and parts of *Asia* and *Africa*, and the islands, ports, havens, cities, creeks, towns and places of *Asia*, *Africa* and *America*, or any of them beyond the *Cape of Good Hope* to the *Streights of Magellan*, in the said letters patent and statutes mentioned, were solely vested in the *East India Company*.

By an act passed in the 7th year of King *George I.* intituled, *An act for the further preventing his Majesty's subjects from trading to the East Indies under foreign commissions, and for encouraging and further securing the lawful trade thereto, and for further regulating the pilots of Dover, Deal, and the Isle of Thanet*, it was, among other things, enacted, That it should be lawful for his Majesty's Attorney General for the time being, at the relation of the Company, or by his own authority, to exhibit a bill in the Exchequer against any persons trading, dealing, trafficking, or adventuring at any time after the 24th of *June 1721*, in, to or from the *East Indies*, or parts aforesaid, contrary to law, or against any person concerned as agent, factor or copartner with such illicit traders, for discovery of such their trade, and for recovering such duties and damages as are therein aftermentioned; waving in every such bill, all the penalties and forfeitures incurred by such persons for the matters in such bill contained; and such persons should answer the said bill, and not plead or demur to the discovery thereby sought, and pay to his Majesty the customs and duties of the goods and merchandize arising, produced or purchased by the said unlawful trade, and should answer and pay to the Company for the same, 30 *l. per cent.* according to the value thereof in *England*.

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By another act, passed in the 17th year of King George II. intituled, *An act for granting to his Majesty the surplus or remainder of the monies arisen or to arise by the duties on spiritous liquors, granted by an act of the last Session of Parliament, and for explaining and amending the said act in relation to the retailers of such liquors, and for establishing an agreement with the United Company of Merchants of England trading to the East Indies*, it was, among other things, enacted, that the said Company should have and enjoy the sole and exclusive trade and traffick, and the only liberty, use and privilege of trading, trafficking and exercising the trade or business of merchandize in, to and from the *East Indies*, and in, to and from all the islands, ports, havens, coasts, cities, towns and places between the *Cape of Good Hope* and the *Streights of Magellan*, in the before mentioned act of the 9th year of King *William III.* or in the said charter of the 5th of *September*, in the 10th year of his reign, mentioned, in as ample manner as the said Company could thereby or otherwise lawfully trade thereto; and that the *East Indies*, islands, ports, towns and places within the limits beforementioned, should not from thenceforth, at any time before the determination of the Company's sole trade to the *East Indies*, and which was thereby declared not to be determinable till after three years notice by Parliament, after the 25th of *March* 1780, and repayment to the said Company of the capital stock and arrears of the annuities therein mentioned, be repaired or sailed to, visited, frequented, or haunted by, any other of the subjects of his Majesty, his heirs or successors; and, if any of the said subjects of his Majesty, his heirs or successors, of what degree or quality soever, other than the factors, agents and servants of the said Company, or such as should be licenced by them, should at any time or times thereafter, before such determination of the said Company's sole trade, directly or indirectly, sail, or go to, visit, haunt, frequent, traffick, trade or adventure in, to or from the *East Indies*, or other the limits before mentioned, contrary to that act, such offenders should forfeit all the ships and vessels employed in such voyage, trade or adventure, with the guns, tackle and furniture thereunto belonging, and also all the goods laden thereupon, or that should be sent to, acquired, traded, trafficked or adventured with in the *East Indies*, or parts aforesaid, and all the proceeds and effects of the same, and double the value thereof, which penalties and forfeitures should be sued for, seized and distributed in
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the manner by the said act of the 7th year of *George I.* directed, concerning the penalties and forfeitures in that act mentioned, or referred to, with respect to the said Company, or their trade in the *East Indies*: And it was thereby further enacted, that the said company should at all times thereafter for ever, subject as therein mentioned, enjoy all the profits, benefits, advantages and privileges, which by any former acts or charters founded thereupon were enacted, given and granted to them, not by the said act altered; and the same were thereby ratified and confirmed.

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On the 6th of *November* 1759, the appellant entered into the service of the *East India* Company, as their factor and covenant-servant at *Fort William* in *Bengal*, in the *East Indies*; and soon after went over in that capacity from *England* to *Bengal*, and continued in such service in *Bengal*, till the 24th of *November* 1766, on which day he having, by a letter, dated the 10th day of the same month, addressed to the Governor and Counsel at *Fort William*, desired leave to resign the service; the Governor and Council agreed, that such his application to resign should be complied with and accepted.

At a consultation of the said Governor and Council, held at *Fort William* on the 5th of *January* 1767, by an order then made, after taking notice that the said *William Bolts* had had permission to resign the Company's service, in consequence of his letter to the board, it was ordered, that intimation should be given to him by the secretary, that, as he could not claim any title to remain any longer in *India*, he was positively required not to engage further in commercial concerns, and to prepare to embark for *England* in one of the Company's ships of that season; and on the same 5th of *January*, or within a day or two after, the appellant had notice of such order. Nevertheless, in breach of the letters patent or charter, and the several acts above set forth, and divers other statutes, and contrary to the above order, and several other subsequent orders of the Governor and Council of *Fort William*, who were duly authorised and appointed by the Company, he continued in, and traded, and carried on the business of merchandize, by himself, and his agents and factors, at and in *Fort William*, and at and in *Benares*, *Patna*, *Moorshedabad*, and several other places and towns in *Bengal*, and other places in the *East Indies*, within the limits described in the said

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letters patent and acts above mentioned, from the 24th of November 1766, until the 23d of September 1768, till which day he remained in the *East Indies*; during all which period of time, or the greatest part thereof, the appellant, by himself or his partners, factors and agents, carried on very extensive dealings in trade within the limits aforesaid, and particularly in salt petre, betel nut, and in woollen goods bought by him, or his order of the *Dutch*, and in other branches of trade, not only with the natives and others of the country, but also at the factories and markets of other *European* powers settled in the *East Indies*, and with their subjects and servants there, greatly to the detriment of the said *East India* Company and their trade, and not only without the licence of the company, but expressly contrary to their orders, or to the orders of their governor and council, and contrary to his own repeated declarations, promises, and assurances by him given, that he continued in the *East Indies* only for the purpose of settling his outstanding concerns, and calling in his effects acquired before the time of his quitting the service of the company; and by means of such illicit trade, the appellant got considerable profits, and acquired large quantities of goods and merchandizes, to the amount in the whole of 100,000 *l.* great part of which he left behind him in the *East Indies*, under the care of his attornies and agents there, particularly Messrs. *Keir, Reed, Cator*, and *Gibson*, as well as several outstanding debts which were due to him, and arose from such illicit trade, and other parts thereof he brought home to *England*, all which goods and merchandize, effects and credits, became forfeited by virtue of the several acts above mentioned, some or one of them.

The appellant, knowing he could not procure ships to bring his merchandize and effects home to *England*, and to conceal, as far as he was able, the illicit trade he had so carried on, either before he left the *East Indies*, or after his return to *England*, gave directions to his attornies or agents, and particularly to Messrs. *Keir, Reed, Cator* and *Gibson*, to exchange his effects and property there for goods proper for the *European* markets, and to collect all his debts and effects, and lay out the money in such goods, or otherwise cause his effects and property there to be exchanged for, and the money collected in from his outstanding debts to be laid out in the purchase of such goods as were proper for the *European* markets; and he, and his attornies

or

or agents in the *East Indies*, by his orders, hired several foreign ships on freight, and particularly two *Portuguese* vessels bound from *Goa* to *Lisbon*, one called *Nra. Sra. de Cannidade & St. Francisco de Paula*, *Nicholas Fernandes de Fonscea* Captain; and the other called *Nra. Sra. de Adjuda & St. Pedro d'Alcantara*, whereof *Thomas de Franca Gortas* was Captain, and also a *Danish* vessel, to bring over to *Lisbon*, or some other foreign port in *Europe*, such merchandizes as his agents and factors could load on board those vessels, and particularly large quantities of piece goods; or the appellant or his agents sold and disposed of all or great part of the cargoes so imported to *Europe*, to some persons who took such ships to freight, or loaded such goods on board them, and were paid for such goods in the *East Indies*, in specie or by bills of exchange, or if not paid for there, they were by virtue of some agreement made for that purpose, paid for either to the appellant, or some person for his account, on the arrivals of those ships in *Portugal*, or on the sale of the goods; and he or his agents, on shipping those goods in the *East Indies*, caused them to be insured for a considerable sum of money.

In the month of *December* 1770, the first mentioned *Portuguese* ship, and on the 6th of *April* 1771, the other of them arrived at *Lisbon*, freighted with the goods of the appellant; and he, on receiving advice of their arrival, went from *England* to *Lisbon*, in order to dispose of his said goods, or to receive the money for which the same were sold in the *East Indies*; and he, or his agents, upon his arrival, or before, or soon after, caused the said goods to be sold, to the amount of 100,000 *l.* and upwards, and the produce thereof, or the money for which the same were sold in the *East Indies*, or a great part thereof, was paid to the appellant in *Lisbon*, or afterwards remitted to him in *England*.

In *Trinity Term* 1771, the Company caused an information, in the name of his Majesty's Attorney General at their relation, to be filed against the appellant in the Court of Exchequer, stating the several matters before set forth; and praying, that he might set forth an account of all his dealings and transactions in trade, in, to and from the *East Indies*, or any port, city, town, or place within the limits above mentioned, since the 24th of *November* 1766, and of all monies, goods, and merchandizes produced

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produced or purchased by such trade, with the value thereof, and in particular, of the several goods shipped and sent to *Europe* from the *East Indies* on his account, and for what the same were sold; and that he might also set forth an account of all such sums of money as were due to the Company on account of such unlawful trade, and that he might come to an account for all the goods and merchandize produced and purchased by such unlawful trade, or the value thereof, and for the damages due to the Company for the same, after the rate of 30 *l. per cent.* according to the value thereof in *England*; the attorney general on behalf of his Majesty, and the Company, waiving all penalties and forfeitures incurred by the appellant for the matters in the information contained, or enquired after.

On the 18th of *February*, 1772, the appellant put in a plea and answer to this information; and to so much thereof as sought a discovery of his trade and dealings in, to and from the *East Indies*, or any place within the limits in the information mentioned, since the 24th of *November*, 1766, and of the effects produced by such trade; and in particular of the goods therein mentioned to have been sent to *Europe* from the *East Indies*, or to compel him to account for such goods, or pay any damages to the company for the same; he pleaded in bar, that King *George II.* by his letters patent, dated the 8th of *January*, in the 26th year of his reign, after reciting (among other things) that the *East India* Company, by a strict and equal administration of justice in the towns, factories, and places belonging to them in the *East Indies*, and other parts beyond the *Cape of Good Hope* to the *Streights of Magellan*, had very much encouraged, not only his own subjects, but likewise the subjects of other princes, and the natives of the adjacent countries, to settle in those towns, factories and places for trade, by which means some of the said towns were become very populous, and especially the towns of *Bombay* or *Calcutta*, and parts before mentioned; and that in pursuance of the powers granted to the Company by his Royal Predecessors, the Company, before the granting of the charter first thereafter mentioned, had constituted within the said factories, several officers, by the name of Governor and Council, and President and Council; but that there being great want in all those places, of proper authority for the more speedy administering of justice in civil causes, and for the trying and punishing of capital

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capital and other criminal offences, misdemeanors, &c. committed within the districts and places aforesaid, and in other the Company's settlements, within the limits of trade granted to them; and for the better government of the several factories belonging to them within the same, his said Majesty granted to the Company and their successors, and by his said letters patent ordained, that there should be for ever thereafter, within the said factory of *Fort William* in *Bengal*, a corporation by the name of the Mayor and Aldermen of *Calcutta*, at *Fort William* in *Bengal*, which should consist of a Mayor and nine Aldermen, seven of which Aldermen, together with the Mayor, should be natural born subjects of his Majesty, and the other two Aldermen might be foreign Protestants, the subjects of any other prince or state in amity with him; and that the said corporation should have perpetual succession, and be chosen or appointed from time to time in manner therein mentioned; and that such Aldermen so chosen should continue in their offices during their lives, and should, with the Mayor, be invested with such powers as in the charter are mentioned. That coming to the knowledge of this charter, the appellant was induced to enter into, and did enter into the Company's service on the 6th of *November*, 1759, under such deed of covenants as in the information mentioned, and continued to serve the Company for five years as thereby stipulated; and afterwards continued to serve the Company in *India* for two years more or thereabouts, but without entering into any deed of covenants for that purpose, about which time he resigned the Company's service; and that having served the Company during the times before mentioned, greatly to the satisfaction of the President and Council of *Fort William*, he was about the time of his resignation appointed one of the Aldermen of the Mayor's Court at *Calcutta*, agreeably in all respects to the said charter, and afterwards officiated in the said office as such, and continued so to do.

The appellant further pleaded, that whilst he continued to act in the last mentioned capacity, the President and Council at *Calcutta* having concerted some cruel, unjust and oppressive monopolies in trade, to their own private emolument, and being, as he believed, guilty of other enormities to the prejudice of the Company's interest, which they were apprehensive might be exposed by him, who had been for some time well acquainted

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with the trade and concerns of that country, the Governor and Council concerted various schemes for distressing him, and, in consequence thereof, proceeded to sentence him to banishment out of *Bengal*, and afterwards caused several of his mercantile agents in remote parts of the country to be seized and imprisoned for many months, and to abandon his effects to the amount of near 20,000 *l.* under their care, and refused their protection to him, and in particular with respect to his agents and the property so abandoned by them, and which on account of the menaces of the Governor and Council he was obliged totally to desert; and afterwards, in *September* 1768, they proceeded to sentence him to be removed from his office of Alderman, in an illegal and oppressive manner; the sentence having been since reversed, on an appeal to his Majesty in Council; and that in order to distress and ruin the appellant, the President and Council, shortly after making the said sentence of removal, in *September* 1768, caused his house in *Calcutta* to be surrounded by a number of armed seapoys in the Company's service, who suddenly seized him therein, and forcibly took him from thence and put him on board a ship, before he could secure his effects, amounting to 185,000 *l.* and sent him to *England*. The appellant also pleaded, that he was the son of *William Bolts*, deceased, who was a native of *Heidelberg* in *Germany*, and an alien; and that he the appellant was born beyond the seas, and out of the allegiance of his Majesty, and was, during his being an Alderman of the Mayor's Court at *Calcutta*, and his subsequent residence there, a Protestant and an alien, and a subject of *Germany*, in amity with his Majesty.

On the 30th of *May* 1772, this plea came on to be argued before the Barons, when, after full and solemn debate, all of them were of opinion, that the plea should be over-ruled, and made an order accordingly.

J. Dunning.

A. Macdonald.

From this order the appellant thought proper to appeal, insisting, that his plea of alienage was a good and sufficient bar to the information; for that about the time of his resigning his office in the service of the Company, he was admitted an Alderman, or Judge of the Mayor's Court at *Calcutta*, under that clause in the charter granted by King *Geo. II.* (commonly called *The Charter of Justice*) which enabled foreign Protestants,

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the subjects of any other Prince or State in amity with him, to hold that office; whereby the appellant was recognized as being, what he really was, the subject of a state at amity with *Great Britain*. That being thus contradistinguished from a *British* subject, he did not come under any of the acts of parliament stated in the information; as those acts expressly regarded subjects of his Majesty, a description which did not apply to the appellant, at the time of his supposed transgression against them. The only ground on which the appellant could be brought within the description of a subject of his Majesty, was the temporary allegiance which he was supposed to have owed to the crown of *Great Britain*, at the time when this pretended illicit trade was carried on; but it must be observed, that legiance is *reciprocum ligamen*; wherefore, if protection be withdrawn, by forcibly banishing an inhabitant, the duty of legiance ceases. The appellant was therefore released from his temporary allegiance, when he was deprived of protection, and of his office of Alderman, and brought a prisoner upon the high seas from the *British* settlements, where the traffick in question could have been deemed illegal only while he resided upon the spot. That the act 7th Geo. I. which enables his Majesty's Attorney General, by his own authority, or at the relation of the *East India* Company, to recover 30*l.* per cent. of the value in *England*, of all goods which are the subject of illicit trade, being a statute highly penal, must be construed strictly; in which case, being expressly confined to *his Majesty's subjects*, it could not be extended so as to comprehend the appellant, who became an Alderman of *Calcutta* in the character of an *alien*; and who in fact, at the time when his effects were embarked in *India*, by another foreigner without his knowledge or privity, was not resident in any part of his Majesty's dominions, nor had any concern with the respondents, at whose instance, as relators, the Attorney General had filed the present information.

On behalf of the respondents it was said, that when the appellant in the year 1759, entered into covenants with the *East India* Company, for his faithful service as their factor in *Bengal*, and continued in such service for seven years, it was not known to the Company, or pretended by the appellant, that he was not a subject of his Majesty, but an alien owing no obedience to him. That the appellant after the expiration of his seven years

E. Thurlow.
J. Skynner.
C. Sayer.

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years service, was appointed by the Company's governor and council, an Alderman and Judge of the Mayor's Court of *Calcutta*, for his life; a high court of justice, constituted by his Majesty's charter, a Court of record, and of civil and ecclesiastical jurisdiction; on the acceptance of which office, the appellant took the oaths of allegiance to his Majesty, and was bound to administer justice according to the laws of *England*; to which laws he now by his plea insisted, he was not subject. That though by his Majesty's charter of justice, it was allowed that two of the Aldermen and judges of the Mayor's Court at *Calcutta* might be foreign Protestants, yet the appellant was admitted to such office, as if he had been a natural born subject of his Majesty; and if he could now derive any extraordinary privilege from being an alien, such office of Alderman was obtained by a fraudulent concealment of the truth; no foreign Protestant having been admitted to it for many years past, from the great increase of his Majesty's subjects at that place. That when the appellant was, in the year 1768, informally and illegally removed by the Governor and Council at *Calcutta* from the office of Alderman of the Mayor's Court, he appealed to his Majesty in Council to be restored to the said office; but he did not in that petition represent himself as a foreign Protestant, or an alien, or in any manner distinguish himself from the rest of his Majesty's subjects. That if those who have been in the service of the *East India* Company, being aliens, or pretending to be aliens, may lawfully carry *East India* commodities from the Company's settlements to the ports of foreign kingdoms, it would virtually put an end to the Company's charter, and all the acts of Parliament made for securing that trade to this kingdom: And if the appellant could avail himself of his present plea, he was in a better situation as an alien, than any of his Majesty's subjects; for he would have the protection and benefit of the laws of *England*, without being amenable to them.

ORDER
affirmed.

M. S. Jour.

sub anno 1773,
p. 706.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.

Richard

Richard Chalke, and John Chilton, Plaintiffs }
Henry Townley Ward, Gent. Defendant } in Error. Case 5.

21st May, 1773.

AT the General Quarter Sessions for the county of *Middlesex*, held at *Hick's Hall*, in *December* 1770, the plaintiffs preferred an indictment against the defendant and two other persons, charging them with wickedly devising to ruin the plaintiff *Chalke*, and conspiring to withhold a debt, alledged to be due to him from one of the parties; by which means they had wholly ruined *Chalke*.

Having procured this indictment to be found upon their own evidence, they obtained a judge's warrant for apprehending the defendant, which they caused to be executed, and the defendant being taken into custody, was obliged to give bail for his appearance to answer the charge.

The indictment being removed into the court of King's Bench, was brought on to trial there by the defendant, on the 13th of *February* 1771; when no person appearing in support of the prosecution, the defendants were acquitted.

The defendant, in order to do justice to his reputation, and to recover satisfaction for the injury he had thus received, on the 23d of *April* 1771, commenced an action in the Court of King's Bench, against the plaintiffs, by attachment of privilege, as an attorney of that Court, with which process the plaintiffs being served, and not choosing to appear, common bail was put in for them according to the statute, and a declaration was filed against them, for having maliciously, and without any probable cause, commenced and prosecuted the above mentioned indictment against the defendant.

The plaintiffs conscious of their being unable to make any defence to this action, (and proof of any *probable* cause for the prosecution would have been a good defence) did not think pro-

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per to plead, and therefore interlocutory judgment was signed against them by default, and a writ of inquiry of damages issued; upon the execution of which, before the sheriffs of *Middlesex*, the jury, upon full proof of the circumstances of the case, assessed the damages at 500*l*.

Several applications were afterwards made to the Court of King's Bench, on behalf of the plaintiffs in error, to set aside this judgment and inquisition, for pretended irregularities, and upon other suggestions, which attempts proved ineffectual; and in *Michaelmas* Term, 1771, final judgment was entered for 500*l*. damages, and 27*l*. 10*s*. costs.

A writ of error was thereupon brought in the Exchequer Chamber, where the plaintiffs thought fit to assign only the general errors, and in *Trinity* Term, 1772, that Court affirmed the judgment.

And now to reverse this judgment of affirmance, a writ of error was brought in Parliament, and the errors assigned were, I. That there was no original writ of attachment of privilege filed, to warrant the declaration. II. That there were only ten days and not fifteen, between the teste and return of one of the original writs. III. That the original writs and declarations were not sufficient in law to maintain the action. IV. That the cause of action appeared to be jointly against *Cchalke* and *Chilton*, and that *Ward* had proceeded by an attachment of privilege against them jointly; whereas by the laws and customs of this realm, no attachment of privilege can issue in a joint action, or for a joint offence. V. That *Chilton* at the time of exhibiting the bill, was one of the attornies of the Court of Common Bench at *Westminster*, and that by the laws and customs of the realm, and of the said Court, and the liberties and privileges of its attornies, *Chilton* ought to have been impleaded in the common Bench only, and not in the Court of King's Bench. And VI. That *Ward* was an attorney of the Court of Common Bench, and having exhibited his bill against *Chilton* in the Court of King's Bench separately and not jointly, *Chilton* was not bound to appear, or answer the same; wherefore, the said bill and all the subsequent proceedings thereon, were totally void.

No case was printed, or any reasons offered on behalf of the plaintiffs, in support of these assigned errors; but on behalf of the defendant it was said, that supposing no writ of attachment of privilege was filed in this cause, yet the want of it would not be matter of error; since the bill which was exhibited against the plaintiffs, as being in the custody of the Marshal, was the foundation of the suit, and not the attachment; however, the attachment of privilege was in fact filed, and returned upon a *Certiorari*. That it was not necessary in this cause to determine, whether the fifteen days between the teste and return of an original writ could be assigned as a matter of error, because this suit was by bill; and an attachment of privilege was merely in the nature of writ of *Latitat*. It was not an original writ, for it is essential to an original writ, that it should issue out of the Court of Chancery, but the attachment of privilege issues out of the Court of King's Bench, and is signed by the proper officer there, whose business it is to make out and sign the writs of *Latitat*, and like them is made returnable before the King at *Westminster*, on a certain day; whereas original writs are returnable on a general return, before the King himself, wheresoever his Majesty shall then be in *England*. Upon this objection, the plaintiffs in error had given judgment against themselves; for if the present suit had been by original, they could not have brought their writ of error in the Exchequer Chamber, but must have resorted to Parliament immediately. That it might as well be contended, that for an injury jointly committed, no action can be maintained, as that an attachment of privilege will not lie in such case; for in all personal actions, an attorney has as much right to this writ, as an unprivileged person has to the ordinary process. With regard to the objection founded on the supposed privilege of the plaintiff *Chilton*, as an attorney of the Court of Common Pleas, to be sued in that Court only; it was submitted, that the objection came too late: The plea of privilege is a plea in *abatement*, and should be offered in the first instance to the Court in which the suit is commenced, and cannot be introduced by writ of error. Besides it was apprehended, that in this case, such plea of privilege could not have been supported, even if it had been tendered in due time to the Court below; because it is an established rule, that an attorney sued *jointly* with another person is not entitled to any privilege, neither is he when sued separately, provided the plaintiff in such action

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J. Wallace.
A. Thompson.

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be an attorney of another Court; nor was it material that the plaintiff *Chilton* happened likewise to belong to the Court of which the defendant was an attorney, since being besides an attorney of another Court, he might sue in either of the Courts at his election. It was not however necessary in this stage of the cause, to decide what would have been the effect of a plea of privilege, if it had been duly put in, the plaintiffs in error not having relied upon it in the proper place.

Judgment
affirmed.
M. S. Jour.
sub anno
1773.
p. 731.

On the day appointed for arguing this writ of error, counsel appeared for the defendant, but none for the plaintiffs; and therefore it was ORDERED and ADJUDGED, that the judgment should be affirmed, and the record remitted; and that the plaintiffs should pay the defendant 50 l. for his costs, sustained by reason of bringing the said writ of error.

Case 6.	<i>Samuel Salt,</i>	-	-	-	Plaintiff	} in Error.
	<i>John Doe,</i>	-	-	-	Defendant	

15th June, 1773.

THE plaintiff in error holding a farm called *Lapley Wood Farm*, in the parish of *Lapley*, in the county of *Stafford*, as tenant to *Thomas Swinfen Esq*; and not managing the same to satisfaction, Mr. *Swinfen* gave a regular and proper notice to the plaintiff in error, to quit the possession of the said farm at old *Lady-day* 1772; but he refused to give up the possession of the farm agreeable to such notice, and afterwards ploughed up great part of it, and sowed the same with flax seed, (which greatly impoverishes and hurts the land for many years to come) and committed other waste and spoil thereon, in defiance of his landlord.

Mr. *Swinfen* therefore brought his ejectment against the plaintiff in error, who was hardy enough to appear and plead thereto; and the ejectment came on to be tried at the assizes for the county

county of *Stafford*, when a verdict was given against the plaintiff in error, and final judgment was afterwards entered thereon.

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To reverse this judgment, but more apparently for the purpose of delaying the execution of it, the present writ of error was brought; and the error assigned was (for there was no case printed, or reasons offered to support it) that the verdict was found for the defendant in error, whereas by the laws of this kingdom, such verdict ought to have been found for the plaintiff in error.

But on behalf of the defendant in error it was said, that the error assigned was for error in the verdict, and not for error in the judgment; whereas error does not lie for the misfinding of a verdict by a jury, supposing any such in the present case to be, but the proper remedy is by application for a new trial, to the Court where the action was brought.

G. Pryce.

On the day appointed for arguing this writ of error, counsel appeared for the defendant, but the plaintiff made default; and therefore it was ORDERED and ADJUDGED, that the judgment should be affirmed, and the record remitted; and that the plaintiff in error should pay the defendant, 100*l.* for his costs sustained by reason of bringing the said writ of error.

Judgment affirmed.
M. S. Jour.
sub anno 1773,
p. 824.

Sir *Robert Staples* Bart. *Grace Staples*,
Widow, and *John Staples*, Esq; } Appellants. Case 7.
Mary Margarettta Maurice, Spinster, Respondent.

19th January 1774.

SIR *Robert Staples*, Bart. being seised in fee of lands in the county of *Londonderry*, and possessed of other lands by virtue of certain leases under the fees of *Armagh* and *Londonderry* respectively, for terms of years renewable on payment of fines, in the year 1682, entered into a treaty of marriage with *Mary Vesey*, one of the daughters of Dr. *John Vesey*, Archbi-

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shop of *Tuam*; and previous to the marriage, by articles dated the 12th of *March* 1682, executed by the Archbishop and Sir *Robert*, in consideration of the marriage, and of a marriage portion of 1000 *l.* it was covenanted, that after payment of the last 500 *l.* part of the portion, Sir *Robert Staples*, his heirs, executors or administrators, should lay out 2000 *l.* in the purchase of lands of inheritance, to be settled to the use of Sir *Robert Staples* for life, with remainder to the said *Mary* for life; remainder to the use of their heirs of both their bodies. And it was also thereby covenanted, that the leases for years, and all the chattels, real and personal, whereof Sir *Robert* was then possessed, or should afterwards acquire, by renewal of leases, purchase, or otherwise, should be to the use of and in trust for the said Sir *Robert Staples*, during his natural life, and after his decease, to the use of and in trust for the children of the said Sir *Robert*, begotten on the body of the said *Mary Vesey*; in consideration whereof, Sir *Robert Staples* did thereby give, grant, and assign over unto the Archbishop, his executors and administrators, all his right, title and interest, of, in and to the said lands, and other the tenements so demised and in lease to him, in trust for and to the uses, intents and purposes aforesaid; and did thereby covenant not to surrender, alien, or otherwise dispose of the same, so as to defeat, or any way disappoint the interest thereby granted.

Soon after the execution of these articles the marriage took effect, and Sir *Robert Staples* afterwards received the marriage portion of 1000 *l.*

On the 21st of *November* 1714, Sir *Robert Staples* died, possessed of the lands held by leases from the sees of *Armagh* and *Londonderry* respectively, which he had from time to time renewed in his own name, and also seised in fee and possessed of a considerable real and personal estate, leaving the said Lady *Mary Staples* his widow, and issue by her three sons, *John*, *Alexander* and *Thomas*, and one daughter, *Mary*, who, upon the death of Sir *Robert* their father, became entitled, by virtue of the marriage articles, to the said leasehold interests in joint tenancy.

Sir *Robert Staples*, by his will dated the 8th of *November* 1714, devised to his son *John* (afterwards Sir *John Staples*) all his estate
both

both real and personal, during his life, he performing his will, and after his death, to the heirs male of his body; and if the said *John* should have no heirs male, then his said estate to descend to his son *Alexander*, during his life, and to his heirs male, with like remainder to his son *Thomas*: And after reciting, that he was then possessed of several lands under the said fees, he willed, that the said leases should be in the possession of his executors and overseers, until they and his wife, or his heirs in possession, should think fit to renew the same.

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After the death of Sir *Robert Staples*, Lady *Staples* his widow, who was appointed sole executrix of his will, proved the same, and permitted her son, Sir *John Staples*, to enter upon and possess the said leasehold lands, and delivered to him the leases whereby they were held from the fees of *Armagh* and *Londonderry*, in order to renew the same, and perform every thing agreeable to the marriage articles.

Sir *John Staples*, by three letters dated respectively the 6th, 11th and 29th of *January* 1714, and written by him to his mother, acknowledged the receipt of the leases, and that one of them had been renewed in his own name, but upon the trusts of the marriage articles and his father's will; and by an instrument under his hand and seal, dated the 10th of *February* 1714, reciting, that he had renewed and taken a lease of several lands in the fee of *Armagh* in his own name, he declared, that he would not dispose of, or otherwise alien the said lands, but that the same should always be subject to and disposed of as the said Sir *Robert* by his will had directed, and likewise according to the tenor of the marriage articles of the 12th of *March* 1682.

Mary, the daughter of Sir *Robert Staples*, and who married the Reverend *Theodorus Maurice*, died about the year 1722, in the lifetime of her husband, leaving issue *David Maurice* and the respondent *Mary Margareta*, to whom the said *David Maurice* in his lifetime, by an instrument in writing under his hand and seal, assigned all his personal estate. *Theodorus Maurice*, after the death of his wife *Mary*, took out administration of her goods and effects.

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In *September* 1730, Sir *John Staples* died, in possession of the said leasehold premises, leaving Lady *Mary Staples* his widow and administratrix, and *Mary* and *Isabella* his daughters and only issue.

Alexander and *Thomas Staples*, upon the death of their brother Sir *John*, became, for the first time, acquainted with the contents of the articles of the 12th of *March* 1682, which had before been concealed from them; and they then resolved to commence a suit for the recovery of the said leases. But before the suit was instituted, *Theodorus Maurice*, who was the administrator of his late wife *Mary*, and the father of the respondent, in order to save the expence and avoid the trouble of becoming a party to such suit, executed an instrument in writing, or assignment, dated the 4th of *March*, 1730, whereby, after reciting the settlement of the said leasehold interests, and the assignment thereof by the late Sir *Robert Staples* to the Archbishop of *Tuam*, by the marriage articles of the 12th of *March* 1682, as before mentioned, the subsequent marriage, and the death of Sir *Robert Staples* in 1714, leaving Dame *Mary* his widow, three sons and one daughter *Mary*, who married the said *Theodorus Maurice*; and also reciting, that the said Sir *Robert Staples*, at the time of his decease, was possessed of and entitled unto two considerable leases, held from the sees of *Armagh* and *Londonderry*, which leases were bound by and subject to the uses and trusts in the said articles, and that *Mary*, the wife of the said *Theodorus*, was since dead; and that he had taken out administration to her, and was advised, that after an allowance for such portion as he received with his said wife, he, as administrator to her, was entitled to a share of the said leases, having heard or been informed of the contents thereof; and reciting, that as the circumstances of the children of Sir *Robert Staples* and Dame *Mary*, who were then living, and the representatives of such of them as were dead, then stood, the said marriage articles could not, as it was apprehended, be set up, and the benefit of them derived to the children then living, and the representatives of such of them as were dead, without a decree of a Court of Equity; and that the said *Theodorus Maurice*, as well from his own disposition, as his want of health, was unwilling to engage himself in such a suit, and was desirous to prevent the children which he had by the said *Mary* his late wife from being involved after his death,

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in the difficulties and expences which must necessarily attend such a prosecution, the said *Theodorus Maurice*, in pursuance of such his resolution, and in order to preserve his children from the burthen and expence of suits, either in law or equity, concerning the premises, and to secure to them the benefit of the said articles in a way and manner less expensive, and in consideration of 10*l.* paid to him by the said *Alexander Staples*, (then Sir *Alexander Staples*) assigned and set over unto the said Sir *Alexander Staples*, his executors, administrators and assigns, all the right, title, interest, claim and demand, of, in or to all such leases which the said Sir *Robert Staples*, or any person or persons in trust for him, or for his use at the time of his death, held, possessed or enjoyed, under the fees of *Armagh* and *Londonderry*, which had since been renewed in the name of any other person or persons, with or under the said several fees; as also all benefit, right, title, interest, property, claim, or advantage whatsoever, which he the said *Theodorus Maurice* in his own right, or in the right of any other person or persons whatsoever, could have or demand, by, from or under the said articles of agreement; to hold the said assigned premises unto the said Sir *Alexander Staples*, his executors, administrators and assigns, subject to the payment of such sum of money by him or them to the children of the said *Theodorus Maurice* by his late wife *Mary*, then living, as three persons therein named, or the survivors or survivor of them, should, when it was decreed, or otherwise settled and determined, that the said leases ought to go and be distributed among the children of the said Sir *Robert Staples* and Dame *Mary*, determine, order and appoint; due consideration being had of the marriage portion already received by the said *Theodorus* with the said *Mary* his late wife, and of the expences which the said Sir *Alexander Staples* should be put to and sustain in the prosecution and establishment of the said right, under the said marriage articles, and of all other equitable allowances which ought to be made to him. But no determination, order, or appointment, was ever made in pursuance of this instrument.

In 1731, *Theodorus Maurice* died, having made his will, and appointed Sir *Alexander Staples*, *Edward Maurice* Clerk, and *Mary Drelincourt*, executors thereof; but Sir *Alexander Staples* and *Edward Maurice* only, proved the same.

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On the 5th of *February* 1731, Sir *Alexander Staples* and *Thomas Staples*, the then surviving children of Sir *Robert Staples*, exhibited their bill in the Court of Exchequer in *Ireland*, against Dame *Mary Staples*, the widow and executrix of Sir *Robert*, Dame *Mary Staples*, the widow and administratrix of Sir *John*, and *Mary* and *Isabella*, the daughters of Sir *John*; praying, that the leasehold interest under the fee of *Armagh*, might be decreed to the plaintiffs; and that Dame *Mary*, the widow and administratrix of Sir *John*, might account for the rents and profits of the said leasehold interest, from the time when Sir *John* possessed himself thereof, and for a sum of 750 *l.* being the consideration received by him for the other lease under the fee of *Londonderry*.

In *February* 1733, the cause came on to be heard, but was then adjourned over, on a doubt being conceived by the Court, whether the articles of 1682, were sufficiently proved; and there was afterwards a reference in the cause, relative to the personal assets of Sir *Robert Staples*, which depended for several years, and at length ended without any award.

Lady *Staples*, the widow and executrix of Sir *Robert*, died intestate; and administration of her effects, and also administration of the effects of Sir *Robert*, unadministred by her, was granted to Alderman *Hans Baillie*.

Sir *Alexander Staples* and his brother *Thomas* afterwards severed the joint tenancy, and in *July* 1741, Sir *Alexander* died; leaving the appellant Sir *Robert* his only child and heir, having in his lifetime made his will, and appointed Dr. *William Vesey*, and his brother *Thomas Staples*, executors thereof.

On the 5th of *February* 1742, *Thomas Staples* filed his bill of revivor and supplement against Lady *Staples*, the widow of Sir *John Staples*, *Mary Staples* his surviving daughter, Dr. *Vesey*, *Thomas Jackson*, *Edward Maurice*, *Hans Baillie* and the appellant Sir *Robert*; and soon afterwards Lady *Staples* and her said daughter *Mary* filed a cross bill, praying to be decreed to the said leasehold estate held under the fee of *Armagh*.

In *December* 1752 both causes were heard, and in the original cause it was decreed, that *Thomas Staples* and Sir *Robert Staples*,
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were entitled to the leasehold interest held under the fee of *Armagh*, discharged from the 2000 *l.* agreed to be laid out in a purchase by the articles of 1682, and that the representatives of *William Vesey* should assign the same; and also that an account should be taken of the rents and profits and renewal fines of the leasehold interest held under the fee of *Londonderry*, from the death of Sir *Robert Staples*, until the same was sold by Sir *John Staples*, and an account of the three fourths of 750 *l.* received by Sir *John Staples* for that lease, with interest from the time of the sale; and such part of the cross bill as sought any part of the *Armagh* lease, and to charge the same, or the three fourths of the 750 *l.* for which the *Londonderry* lease was sold, with an annuity of 150 *l.* a year to Dame *Mary Staples*, was dismissed.

This decree was regularly inrolled, but the respondent, who was the only surviving child and issue of *Theodorus Maurice* and *Mary* his wife, afterwards, on the 13th of *November* 1761, filed her bill in the said Court of *Exchequer*, against the appellant and the said *Thomas Staples*, the then surviving executor of Sir *Alexander Staples*, and also against *Folliot Warren*, Esq; and *Mary* his wife, who was the daughter and administratrix *de bonis non* of Sir *John Staples*, and the said *Hans Baillie* and others, praying an account of the rents and profits of the said leasehold interests, held under the fees of *Armagh* and *Londonderry* respectively, from the time of the death of Sir *Robert Staples*, and of such parts of the personal estate of Sir *Robert* as came to their hands, or for which they had received compensation; and that the respondent might be decreed to a share thereof and of the said leasehold interests, and that the former decree of 1752 might be set aside, as against the respondent, as having been obtained by fraud.

The appellant and the said *Thomas Staples* put in their answer to this bill, and thereby insisted, that they were not accountable to the respondent for any of the matters claimed by her bill; and particularly, that the respondent's mother having died in the lifetime of Sir *John Staples*, her share in the leasehold lands of Sir *Robert Staples*, survived to Sir *John*, *Alexander* and *Thomas Staples*, and that the joint tenancy was not severed until after the death of Sir *John Staples*; and they further insisted, that the question concerning the right of survivorship among the children of

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of Sir *Robert Staples*, was determined by the decree made in the year 1752; and they claimed the like benefit of that decree, as if they had pleaded it in form.

In *August* 1762, and before any further proceedings were had in this cause, the defendant *Thomas Staples* died, having first made his will, and thereof appointed *Grace Staples* his wife, and *John Staples* his eldest son, executors, who duly proved the same, and against whom the cause was afterwards duly revived.

On the 11th of *May* 1772, this cause was heard before the Barons; and after several days hearing, stood over for judgment until the 20th of *July* 1772, when the Court were pleased to decree, that the respondent was entitled to one fourth part of the leasehold interest held under the see of *Armagh*, and that an injunction should issue to put her into possession of the same; and that the respondent was entitled as against the appellants *Grace* and *John Staples*, as executors of Sir *Alexander* and *Thomas Staples*, to one fourth part of what Sir *Alexander* and *Thomas Staples* respectively made or received out of the said leasehold interest, from the time of their entering into possession or receipt of the rents, after the death of Sir *John Staples*, to the time of their respective deaths; and that the respondent was also entitled as against the appellants Sir *Robert Staples*, *Grace Staples* and *John Staples*, to one fourth part of what they respectively made or received out of the said leasehold interest, since the respective deaths of Sir *Alexander* and *Thomas Staples*, credit being given for one fourth part of all renewal fines, and other charges attending such renewals.

A. Wedderburn.
J. Dunning.
W. Selwyn.

From this decree the appellants appealed, insisting, that all the children of Sir *Robert Staples* were clearly joint tenants of the leasehold estate, settled on them upon the marriage of their father; they had the same interest accruing to them all, by virtue of the same deed or conveyance, namely the articles of 1682, and which vested in them all at one and the same time, upon the death of Sir *Robert* in 1714. That the estate having all the properties of a joint estate, a right of survivorship was the regular and legal consequence; and therefore *Mary*, the respondent's mother, dying in 1722, without having severed the joint tenancy, her share in this leasehold estate accrued to Sir *John, Alexander*

ander and *Thomas*, the then surviving joint tenants. There is nothing hard, severe or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants; and wherever that equality does not subsist, as between a corporation and a private person, there can be no joint tenancy. If any of the joint tenants have a bad opinion of their own lives, they may sever the joint tenancy, and destroy the right of survivorship, by a deed granting their respective shares in trust for themselves, or may enter into covenants not to take advantage of each other by survivorship. But if the joint tenancy be not severed, it is an evidence of intention in the party to submit to the chance of survivorship, or of that supineness and neglect, to which our law affords no assistance. That the settlement by the articles of 1682, had the effect of that clause which is usually inserted in almost all marriage settlements; *i. e.* that the shares of children dying before the age of 21, when they may sever the joint tenancy, shall go to the survivors. Lastly, that no argument or inference could be drawn from any supposed fraud in this case, against the appellants: And if any fraud was imputable to Sir *John Staples*, in the concealment of the articles, the injury arising from it was not peculiar to the respondent's mother, for Sir *Alexander* and *Thomas Staples* were equally defrauded by such concealment.

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On behalf of the respondent it was argued, that marriage articles are considered by Courts of Equity, as minutes of the intent of the several parties, to be afterwards carried into execution by a formal settlement; the intent however, is the leading and capital rule. Hence it is, that though in case of contrariety between articles and a settlement actually made before marriage, the latter shall prevail, because a new agreement is presumed; yet where such settlement is made after marriage, it shall be controuled by the articles, and their import shall prevail. That in the present case, there could not be the least doubt of the intent of the several parties to the articles of 1682. The portions thereby created for the children, were clearly meant as separate and distinct interests in each child, for the maintenance of each, and of the children he or she might have. But this very natural and rational intent, was totally overturned by the notion of a joint tenancy, which let in a mischief never dreamt of by the parties; for if the two younger brothers and the sister

E. Thurlow.
A. Forrester.

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had all died in Sir *John Staples's* lifetime, leaving ever so many children, he, the heir of the father, and taking a considerable real estate as such, would, by the mere chance of survivorship, have carried off the whole of the father's real and personal estate, and the families of the younger brothers and sister would have been left to beggary. That joint tenancy, originally applicable to land rights only, and derived from feudal principles, calculated for the support of military tenures long since abolished, is now constantly discountenanced in Courts of Law and Equity; every parent in providing for his children, whether by will, by articles, or by settlement, is naturally supposed to have in view, not only his own immediate children, but their posterity also; and that the provision he is making for his children be such, as may enable them to marry, and provide for a wife and their issue. And if this holds in wills, where even children are considered only as volunteers, *a fortiori* must it do so in marriage articles, under which they are considered as purchasers for the most valuable of all considerations. And had a recent application been made to a Court of Equity, for carrying these articles of 1682 into execution, the provision thereby made for the children, would certainly have been decreed to them not in joint tenancy, but as tenants in common.

But further: No man, though innocent, can be permitted to reap the benefit of another's fraud, to the prejudice of a stranger. Sir *John Staples* was guilty of a most flagrant fraud, in concealing the articles of 1682, and by that means possessing himself of the whole leasehold interests. *Mary*, the respondent's mother, was, to the time of her death, ignorant of her right. She left two children unprovided for; and had she known of her interest in these leaseholds, under the articles of 1682, she would certainly have taken the necessary steps to prevent survivorship, (if there was a pretence for it) and by a prudent partition have secured a provision for her children: But Sir *John's* fraud prevented her from doing so. Sir *Alexander* and *Thomas* endeavoured to avail themselves of that fraud, and appropriate to their own use, what was intended as a provision for *Mary* and her children: A Court of Equity therefore ought surely to interpose, and do for *Mary's* children what she undoubtedly would have done for them herself, had she not been prevented by the grossest of frauds. Nor was her husband's assignment after her death

death, any bar to, but, on the contrary, a strong inducement to such interposition. In the first place, it was but conditional, that an award should be made by three persons particularly named, which they never made, and so the condition was never performed. In the next place, it proved Sir *Alexander* and *Thomas Staples*'s own conviction of their sister's right to a fourth of these leaseholds, and other their father's personal estate, for otherwise, their applying for and obtaining this assignment was merely nugatory. But that it was applied for and obtained with a fraudulent view, appeared from their immediate subsequent conduct; for Sir *Alexander*, though he had signed the instrument which admitted his sister's right, yet in the bill which he and *Thomas* filed, they artfully introduced the right of survivorship, a right inconsistent with that, which by the instrument they had acknowledged; in hopes of obtaining a decree founded on that claim, and then set up that decree in bar of the right of their sister and her representatives. After Sir *Alexander*'s death, this fraud was carried on still more perniciously by his surviving brother *Thomas*; which more than sufficiently warranted the Court in setting aside the decree in 1752, as obtained by concealment and misrepresentation of the truth, even had it determined the question of survivorship in the then plaintiff's favour; but in fact, it did not appear to have determined the fact either way.

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After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the respondent's bill in the Court of Exchequer in *Ireland*, should be dismissed, without costs.

DECREE
reversed.
M. S. Jour.
sub anno
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p. 30.

<i>Francis Yateman,</i>	-	-	Appellant.	Case 8.
<i>Sarah Cox, and others,</i>	-		Respondents.	

26th January 1774.

THE Church of *Dorchester*, in the county of *Oxford*, is a very ancient church, founded in the earliest ages of Christianity in *England*, and the mother Church of its peculiar; and
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as such, the rectory or spiritual profits of such peculiar belonged thereto of original right, in which peculiar are the towns of *Dorchester*, *Benson*, *Warborough*, *Hadham*, *Chislehampton*, *Drayton*, *Clifton*, *Bircot*, *Overy*, *Nettlebed* and *Baldon*, or *Baddington*, under which general name of *Baldon* or *Baddington*, are comprehended and known the townships of *Foot Baldon*, *Marsh Baldon*, *Lawrence Baldon* and *Little Baldon*, and every of them, all lying within the boundary of *Baldon* Field, but neither of them of itself known by the name of *Baldon*, without other addition, and all the *Baldons* keep the same festival, being that of *St. Lawrence*.

The church of *Dorchester*, with the spiritual profits of its peculiar, was anciently parcel of the possessions of the bishop and convent of *Dorchester*, and after the removal of the see to *Lincoln*, such spiritual possessions remained the property of its chapter, consisting of secular canons, with an Abbot presiding over them instead of the Bishop.

Besides the rectory or spiritual revenues of the peculiar, the monastery of *Dorchester*, before *anno* 1291, had the rectory of the church of *Shirburn*, another ancient mother church within the same county, appropriated to its use, but those of the peculiar belonged to it from the earliest payment of tithes; it had also sundry temporal estates, and there were great grounds to conclude that the Abbot had a house at *Shirburn*, and often retired to it, and was there at the time of the survey of the possessions of the monastery of *Dorchester*, in the 26th of *Henry VIII*.

Dorchester church, and the whole of its peculiar, is in the deanery of *Aston*; and whether through the hurry and confusion of those times, or the inaccuracy of the survey of 26th *Henry VIII*, all the possessions of *Dorchester* are returned therein as being in *Aston* deanery; although *Dorchester* church and the whole of its peculiar, is in the deanery of *Cuddefden*, and rated amongst other churches, having spiritualities in the deanery of *Cuddefden*, *anno* 1291, but no such church as *Marsh Baldon* having any spiritual endowment, is to be met with in the taxation of spiritualities, *anno* 1291.

The peculiar or ancient parish of the church of *Dorchester* being very extensive, and many villages or hamlets within it remote

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mote from the mother church, occasioned the erection of many chapels within its peculiar rectory; and subsequent to the division of the diocesses in parochial cures, and the establishment of tithes in this kingdom, some of these chapels were independent chapels, endowed with a temporal revenue in perpetuity, by some pious persons for maintenance of a priest to perform divine service; and for the better accommodation of the inhabitants, they were allowed the privilege of sacraments and burials, and other parochial rights, and presentation being made of some of them by their founder or endower, became from that time presentative; and institution the mode of investing its incumbents with such temporal revenues wherewith endowed, and to enable them to recover and defend the same, was practised and allowed: Others have no such provision, yet most of them, either through the presentation of their patrons or vulgar reputation, have now acquired the reputation of parish churches, and the hamlets wherein they are situated, distinct parishes, although anciently parcel of *Dorchester*, and no tithes belonging of original right to any of them, except *Dorchester*.

The convent of *Dorchester* being dissolved *temp. Henry VIII.* the Crown, for valuable considerations paid into the Exchequer, granted it spiritual revenues out in parcels to sundry purchasers, by such descriptions as appeared best adapted to ascertain the matters granted; and this, according to the language of such grants, was by the description of the rectory of such place, &c. whereof the grant was of the spiritual profits or tithes; amongst others, one *Toppes*, in the 28th of *Henry VIII.* had a grant of all tithes and glebe lands of all the *Baldons*, parcel of the peculiar rectory of *Dorchester*, by the description of the rectory of *Baldon*, parcel of the possessions of the monastery of *Dorchester*; and in the eighth year of *Queen Elizabeth*, the Crown, in consideration of 1,152*l.* paid into the Exchequer, granted, *ex certa scientia*, the reversion of such rectory of *Baldon* generally, parcel as aforesaid, to one *Hall* in fee, excepting the advowson of all rectories, vicarages and churches.

Soon afterwards, *Hall* granted the said rectory of *Baldon* to one *Anthony Pollard*, an ancestor of the respondent *Lane's* in fee; from whom it descended to *John Pollard* and afterwards to

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Lewis Pollard, great grandfather of the respondent *Lane*, and of *Margaret* the late wife of the respondent *Bacon*.

In the 6th year of King *James I.* the Crown granted licence to *John Pollard* and *Lewis Pollard*, to alien the rectories of *Marsh Baldon*, *St. Lawrence Baldon*, and *Little Baldon*, to *Richard Goddard* and *John Staunton*, but for what purpose or estate did not appear.

In the 14th year of King *James I.* the said *Lewis Pollard* demised to one *Allen* for 99 years, (if three lives therein named should so long live) all that the rectory or rectories, parsonage or parsonages of *Foot Baldon*, *St. Lawrence Baldon* and *Marsh Baldon* and every of them, excepting all the tithes of *Little Baldon*, of one yard land called *Shurles*, and such tithes and tenths as one *Robinson* clerk, the then incumbent of the church of *Marsh Baldon*, had enjoyed by the space of 20 years then past; and also levied a fine thereof to *William Dewe* and *William Loder*, by the names of the rectories of *Foot Baldon*, *St. Lawrence Baldon* and *Marsh Baldon*.

Sometime in the year 1618, *Robinson* died, having been incumbent of the church of *Marsh Baldon* from anno 1562, being presented to the parish church of *Marsh*, but not to the rectory, in the said year 1562; on his decease one *Humphreys* was presented, anno 1619, by *Ann Roberts* and *Augustin Roberts*; but not in the stile *Robinson* had been presented, which was to the parish church only; but now the presentation was to the rectory and parish church of *Marsh Baldon*; and in the year 1620, King *James I.* presented the same *Humphreys* to the said rectory of *Marsh Baldon* solely, as a lapse.

In the second year of King *Charles I.* the said *Lewis Pollard* granted in fee to one *James Jennens*, all that the rectory and parsonage of *Baldon*, (excepting, as in the said demise to *Allen*, all tithes of *Little Baldon*, of the said yard lands called *Shurles*, and such tithes as *Robinson* had enjoyed for 29 years then past); and levied a fine of the said rectories, by the name of the rectories of *Foot Baldon*, *Marsh Baldon* and *St. Lawrence Baldon*.

In the same year a writ of *distringas* issued to distrain the tenants of the said rectory, who returned, that *James Jennens* then held

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held the rectory; and in *Michaelmas* Term he appeared and alledged, that King *James I.* by letters patent dated the 10th of *November*, in the 11th year of his reign, granted licence to *Lewis Pollard*, *inter alia*, to alien the rectories and churches of *Marsh Baldon* and *St. Lawrence Baldon*, with all glebe lands, tithes, &c. And on the 5th of *November* in the same term, *Lewis Pollard* appeared in person and said, that he was seised in fee simple or fee tail, and by indenture of the 15th of *November*, 11th *James I.* conveyed to *Thomas Goddard* and *John Gardner* and their heirs, *inter alia*, all the said rectories; and alledged, that the rectories of *Marsh Baldon* and *St. Lawrence Baldon* and the afore-said rectory of *Baldon*, mentioned in the said letters patents, were one and the same and not different, and thereupon was dismissed the Court.

In the year 1649, *Jennens* and one *Fiennes*, with *John Pollard*, son and heir of *Lewis Pollard*, then the husband of *Susan*, daughter and sole heir of *John Danvers*, and in her right lord of the manor of *Marsh Baldon*, by mutual deeds of exchange, exchanged all the tithes of certain lands mentioned in a schedule annexed to one of those deeds, for all the tithes of certain lands mentioned in a schedule annexed to the other of such deeds, &c. *inter alia*, all tithes, tenths, oblations, obventions, &c. of *Hatchet Piece*, consisting of 12 acres, of one close called *Hanging Lands* of 28 acres, and 6 acres in *Short Monkbill*, thentofore parcel of *Little Baldon*, which were passed to *Jennens* on such exchange, in lieu of other lands parcel of *Little Baldon* farm.

On the decease of *James Jennens*, the rectory (excepting as above) descended to *Richard* his son, and afterwards came to *William Jennens* his grandson, who sold and conveyed it to one *Sayer*, and in anno 1711, in pursuance of a decree in Chancery, the same was conveyed to Mr. *Yateman's* grandfather, who died in 1712, and on whose death it descended to the appellant's father, a minor at school.

In 1752, the appellant's father died, by which the rectory descended to the appellant, but before the decease of his father, the respondents *Lane* and *Bacon*, or their tenants, had withheld sundry little matters of tithes whereto his tenants were entitled; but

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but their value being inconsiderable, and not then discovered as leading to greater incroachments, the complaints of the tenants of the rectory were considered as matters not sufficient to answer a suit. Encouraged however by such forbearance, the respondent Dr. *Bacon* formed a larger plan for depriving the impropiator of all his hay tithes arising from *Marsh Baldon* lands, in opposition to constant enjoyment; and to this end, ordered one *William Cox*, who rented of him as well those tithes which were excepted for the use of *Robinson*, as a piece of ground consisting of 15 acres, called *Smith's Piece*, common field lands of Mrs. *Lane* his sister-in-law, whereof the appellant had only two thirds of the tithes, and the minister of the church of *Marsh Baldon* the other third, or a composition in lieu of such third; to lay down such piece into meadow, and being in cock, the appellant's tenant or servant tithed the same in the proportion which the corn had paid; and as he had hay before off another piece in the occupation of Mrs. *Lane* herself, paying the like proportion of tithes.

Besides these tithes, Mrs. *Lane* laid down a small parcel of land, formerly parcel of *Hatchett Piece*, but afterwards mounded off and called *Hatchett Close*, parcel of the lands whereof all tithes were exchanged in 1649: And Dr. *Bacon* ordered one *Martin* his tenant, to refuse payment of the privy tithes of *Hanging Lands*, held by lease of *Queen's College, Oxon*, other parcel of such exchanged tithes, under pretence that only the corn tithes of the former were exchanged, and only predial tithes of the latter, and not all tithes thereof; and therefore that all not exchanged belonged to Mrs. *Lane*, as heir of *John Pollard*, son of *Lewis Pollard*, as unconveyed on the exchange, or to Dr. *Bacon* her brother-in-law, under his general right as rector of the parish of *Marsh Baldon*; although, under *Lewis Pollard's* exception, Mrs. *Lane* claimed the tithes of sundry of her *Marsh Baldon* lands, in respect of her being heir of *Lewis Pollard*, and their being parcel of *Little Baldon* farm, at the time of *Lewis Pollard's* grant of the rectory of *Baldon* to *Jennens*, and reservation made. Dr. *Bacon* also reserved the furze of many lands of his farm in *Foot Baldon*, let to one *Freuen*, and disposed thereof to Mrs. *Lane*; and after being stacked upon Mrs. *Lane's* land two years or more, the same was burnt, and an allowance refused.

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In *Trinity* Term 1760, Mr. *Yateman* filed his bill in the Court of Exchequer, as owner of the impropriate rectory of *Baldon*, setting forth, that a chapel was many years since, though long after the establishing of tithes, founded in the township of *Marsh Baldon* by some lord of that manor, and that the same, for many years within memory, had been presented to by the name of a chapel, and that the same had been endowed with lands in perpetuity, by some lord of the manor of *Marsh Baldon*, for maintenance of a priest, and by means thereof its advowson belonged to them; but that the rectory or spiritual profits of *Marsh Baldon*, was parcel of the rectory of *Baldon*, and that he was seised thereof, except such parts as *Lewis Pollard*, great grandfather of Mrs. *Lane*, had excepted thereout in his grant to *Jennens*; and praying an account and satisfaction of all titheable matters.

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To this bill the defendants severally put in their answers, alledging, that in *Baldon* there were two ancient parish churches, and that each of such churches had a rectory, or the spiritual profits of the place appendant to it; and that the church of *Marsh Baldon* was a primitive mother church, and not subject to any other church; that the presentations thereto from time immemorial, ever had been to the rectory and parish church of *Marsh Baldon*; and that Mrs. *Lane* several years since presented Dr. *Bacon* thereto, and that he had institution and induction into the same, and was rector of the parish church of *Marsh Baldon*, and as such, of common right, entitled to all tithes thereof not constantly enjoyed by the appellant, and those under whom he claimed. But they admitted the appellant to be seised of the rectory of *Baldon*, which they alledged was only the rectory of *Foot Baldon*, and not of the whole of *Baldon*, or all the *Baldons*; for that *Marsh Baldon* was a distinct rectory and ever belonged to the parish church of *Marsh Baldon*, which was a primitive mother church, of the advowson of the lord of the manor of *Marsh Baldon*, and never appropriated to the monastery of *Dorchester*; but they admitted that either by appropriation, or under some other right, the greatest part of the tithes of *Marsh Baldon* belonged to the monastery of *Dorchester*, and as such might pass by some general words, in the grant of the Crown under the description of the rectory of *Baldon*, and that under such appro-

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priated right, though not of common right, the appellant might be well entitled thereto.

Soon afterwards Mrs. *Lane* and Dr. *Bacon* filed their cross bill against the appellant, setting forth, that the church of *Marsh Baldon* was a primitive mother church, not subject to any other church, and that the presentations thereto had been made from time immemorial by the name of the rectory and parish church of *Marsh Baldon*, and that the advowson of such rectory and parish church belonged to Mrs. *Lane*, [as lady of the manor of *Marsh Baldon*, she being the granddaughter and heiress of *Susan*, the daughter of *John Danvers*.

To this bill the appellant put in his answer, admitting Mrs. *Lane* to be seised of the manor of *Marsh Baldon*, and entitled to present an incumbent to the church or chapel of *Marsh Baldon*, for that some lord of that manor had founded the same on his own ground near to his mansion house, and endowed it with lands for the maintenance of a minister to perform divine service therein : And that its incumbent was in his own person seised of its profits, and enabled to recover and defend the same in his own right and as such rector thereof, and had institution as being requisite to vest him therewith, but that such church was founded many years after the establishment of tithes in *England*, and within time of memory, and that its founder could not endow it with any property, not at his disposal, in prejudice of the rights of the elder church ; and that it was not a primitive mother church, or had any rectory or spiritual profits of common right appendant thereto, for that the church of *Dorchester* was its mother church, under which he claimed, and that the presentations had not from time immemorial been to the rectory and parish church, but on the contrary, for a long series of years within memory, it had been presented to by the name of a chapel, and had not the cure of souls of original right, but as a superadded privilege ; neither was the respondent *Lane* entitled to present to such rectory, for that the addition of rectory was a modern addition, and usurped and improper, in that the rectory or spiritual profits of *Marsh Baldon*, did not belong of common or original right to the church or chapel of *Marsh Baldon*, or of the advowson of Mrs. *Lane*, neither was any such rectory excepted by *Lewis Pollard* in any grant of his ; but, on the contrary, only some portion of tithes parcel of the rectory of *Baldon*,
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the rectory of *Marsh Baldon* being mentioned as parcel of the matters granted; and that the appellant's right could not be prejudiced by the presentation, or any other act of any person not entitled to the tithes or spiritual profits of *Baldon*; and that no proprietor of the rectory of *Baldon* was ever a party to any presentation, and therefore their right was not affected thereby: But the appellant admitted Dr. *Bacon* to be entitled to all such tithes, parcel of the rectory of *Baldon*, as himself and his predecessors had constantly enjoyed under *Lewis Pollard's* exception, as an addition to the original endowment of the church of *Marsh Baldon*.

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The cause being at issue, witnesses were examined, and the appellant gave in evidence, that the inhabitants of *Marsh Baldon* attended the visitation of the church of *Dorchester*, visitable as a donative peculiar church by its patron *Thomas Fettyplace*, Esq; or his official, as well as the inhabitants of the other *Baldons*, in acknowledgment of such church being their original parish church or mother church; and he also proved by written evidence, that the presentations had not ever from time immemorial been to the rectory and parish church of *Marsh Baldon*, but that, on the contrary, the first presentation thereto was in the time of King *John*, and after the year 1209 to the chapel of *Baldington*, on condition of residence and payment of a pound of Frankincense to the mother church of *Dorchester*; and that it appeared not to have any tithes or spiritual property belonging to it in the year 1291; that the word *rectory* was matter of addition, subsequent to the demise to *Allen* in the 14th year of King *James I.* and the exception therein contained; and that the presentations for a long series of years after its foundation were to the chapel, afterwards to the church, then to the parish church, as set out in the appellant's bill, and not before 1619 to the rectory: The appellant also in general proved the truth of the above historical narration, and that there was no such field as *Marsh Baldon* Field, but that all the tithes in question arose out of *Baldon* Field, and no possibility of perambulation without taking therein the whole circuit of such field.

The respondents gave no matters in proof relative to their own issue, or to counteract the appellant's evidence, proving only that at this time there were two churches in *Baldon*, and each of them were parochial churches, and two parishes, the one called

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called *Foot Baldon* church and parish, the other *Marsh Baldon* church and parish; and that each of such churches had sacraments, burials, &c. and that the respondent *Lane*, as lady of the manor of *Marsh Baldon*, had the advowson or right of presenting an incumbent to the parish church of *Marsh Baldon*, and did present *Dr. Bacon*; and that he had institution and induction.

On the 13th of *December* 1770, the cause was heard, when the Court was pleased to dismiss the appellant's bill with costs: And upon a rehearing, on the 26th of *November* 1772, the former decree was affirmed.

J. Glynn.
J. Allyene.

From both these decrees the present appeal was brought, and on the appellant's behalf it was said to appear from conclusive evidence, that the presentations had not from time immemorial been to the rectory and parish church of *Marsh Baldon*; but on the contrary for a long series of years, and within time of memory, the same had been presented to by the name of a chapel, which was founded by some lord of the manor of *Marsh Baldon*, and by him endowed with a temporal revenue; and that *Dorchester* was its mother church. It also appeared, that the rectory or spiritual profits of the whole peculiar of *Dorchester*, belonged to the church of *Dorchester*, as its mother church; and that the church of *Dorchester* was rated in respect thereof, in the taxation of spiritualities, *anno* 1291. It likewise appeared, that the general name of *Baldon*, includes all the several townships of *Baldon*; and that *Baldon*, including therein all such townships, is parcel of the peculiar of *Dorchester*, and as such was parcel of the possessions of the monastery of *Dorchester* at the time of its dissolution: And that, on such dissolution, the Crown granted the rectory or spiritual profits of *Baldon* generally, parcel of the spiritual profits of the church of *Dorchester*, to the person under whom the appellant claimed; who in a regular course of descent was entitled thereto, except such matters, parcel thereof, as were excepted by *Lewis Pollard* in his conveyance to *Jennens*. It was therefore hoped, that the decree would be reversed.

A. Wedderburn.
J. Skynner.
J.A. Stainby.

On the other side it was said, that the appellant, by claiming as general rector, had brought the question between him and the respondents to a single point, *viz.* *Whether Marsh Baldon was*

a parish or rectory, or only a township or chapelry? It appeared in evidence, that it had uniformly been presented to by the name of a church, *ecclesia*, which signifies the parsonage with its whole endowment; that the incumbent was stiled rector, from the year 1465, to the present time; and that it was considered as a church for a century before, making a space of 400 years. That the mode of presentation proved this; for had it been a chapel, the patron would have presented the clerk to the appropriators, and they would have admitted him; whereas it appeared, that he was presented to and instituted by the Bishop, or his Official. Besides, it had the characteristics of a parish church, in having baptism and sepulture; and there was no proof on the part of the appellant, of any subordination of it to *Foot Baldon*, as a mother church; no right to seats there; no contribution to the repairs of it; no resorting thither as to a mother church, on stated days; no oblations paid; no oath of obedience to the rector, or vicar, as required by ancient canons: But it kept its own poor, stood in a different deanery, and was in no one instance dependent thereon. The survey of *Henry VIII.* and the payment of first fruits and tenths, was decisive evidence on this point.

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But it was insisted, that because *Marsh Baldon* appeared to have been presented to as a chapel, from 1209, to 1320, which is within the legal time of memory, it could never afterwards gain the right of a church; and that it was pensionary to the church of *Dorchester* in a pound of frankincense, which shewed it to be subordinate thereto. To this it was answered, that the absolute distribution of parishes, as they are now, was not at that time fixed; that in those ages, the terms church and chapel were synonymous; that a *quare impedit* lay for a chapel as well as a church, before the year 1285; that a church may be presented to as a chapel, and yet remain in right a church; and on the other hand, a chapel may commence a church, by being presented and instituted thereto as such: And that no argument could be drawn from any such pension; because it might be payable without inferring subordination, from church to church, abbey to abbey, by decree, agreement, gift, or deed. But the appellant claimed this rectory of *Marsh Baldon*, as included in the grant from the Crown by King *Henry VIII.* under the general description of *the rectory of Baldon, late parcel of the*

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monastery of Dorchester. This might be applicable to the rectory of *Foot Baldon*, which was appropriated to that monastery; but could by no means include *Marsh Baldon*, which never was appropriated to that, or any other ecclesiastical body, but remained in lay hands from the year 1272, to the present time. Nor could *Lewis Pollard* by his grant to *Jennens*, in 1626, by any amplified words or description, pass more than what was included in the original grant from the Crown, or affect the rector's right. Besides, it appeared that *Lewis Pollard* never had any estate or interest in the manor or advowson of *Marsh Baldon*; and that the same did not come into his family, till the year 1636, ten years after that grant, upon the marriage of his son *James Pollard*, with the heiress of the *Danvers's*. And had the appellant been rector, he would not have been contented with taking one fifteenth only of the corn tithes, when he was entitled to a tenth.

DECREES
affirmed.
M. S. Jour.
sub anno 1774.
p. 51.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decrees therein complained of, affirmed.

Case 9.

Edmund Filmer, Clerk, and *Francis Filmer*, Esq; and Others, } Appellants.

Henry Thomas Gott, Esq; - Respondent.

Et à contra.

3d February 1774.

MARY Gott and *Sarah Gott*, upon the death of their brother, and of another sister named *Elizabeth*, and after they were considerably advanced in years, became seised in fee simple as coparceners of several real estates in the counties of *Kent* and *Sussex*, consisting of a capital mansion, heriotable manor, and divers farms, let to tenants at very old rents, amounting to 898 l. 3 s. 4 d. per ann. and of upwards of 2000 acres of valuable woodland, which were not let, but kept in hand.

Mary

Cases in Parliament.

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Mary Gott usually resided in *Suffex*, and *Sarah* at *Eggarton*, near *Canterbury*, the mansion house upon the *Kentish* estate; *Mary* died in *July* 1768, having first made her will, dated the 13th of *October* 1760, whereby she devised her moiety of the estates to the respondent (whose name was then *Greening*) in fee.

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The estate in *Suffex* was considerably the most valuable; and *Sarah Gott* always left her moiety of it entirely to the management of her agents: No part of it had ever been surveyed, estimated or understood by herself, after she became entitled to an interest in it.

After the respondent, upon the death of *Mary Gott*, became entitled, under her will, to a moiety of the real estate, he knowing that *Sarah Gott* had made her will, and devised her moiety to the appellants *Huggeffens* (the three infant daughters of a gentleman who was her near relation) became very desirous to secure the whole estate to himself; and being satisfied that, in case of the death of *Sarah Gott*, it would be difficult for him to do it, he came to *Sarah Gott's* house at *Eggarton*, very soon after her sister's death, viz. in *April* 1769, and proposed to purchase her moiety. She told him, "she did not choose to sell her share of the estate:" The respondent however, from time to time, repeated his desire to become the purchaser of her moiety; at length tired out by his importunities, and confiding in the solemn assurances which he gave her, that the price he proposed was the full value, she was prevailed upon by the respondent to consent to sell him her moiety of the real estate for 10,000 *l*.

At the time of making this contract, which was only verbal, and made in the presence or hearing of none but the two contracting parties, *Sarah Gott* was 77 years of age, had been absolutely bed-ridden for above three years, was just recovered from a very dangerous illness, and had no friend or agent about her with whom to advise. But having thus consented to the sale, the respondent immediately set out for his own house at *Brentford*, 70 miles from *Eggarton*; and used such uncommon dispatch, that he returned to *Eggarton* on the 2d of *May*, about three o'clock in the afternoon, with deeds of conveyance prepared and ready to be immediately executed, and accompanied by a witness to attest

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test the execution. He instantly repaired to the old lady's chamber, where he continued till seven or eight o'clock in the evening, when, at his request, she executed deeds of lease and release, bearing date the 1st and 2d of *May* 1769. The release recited among other things, "That the parties were seised in undivided moieties in fee simple, as tenants in common; and that it had been concluded and agreed upon, by and between the said *Sarah Gott* and *Henry Thomas Gott*, for the absolute sale by her the said *Sarah Gott*, unto him the said *Henry Thomas Gott*, of the fee simple and inheritance of the said undivided moiety, of her the said *Sarah Gott*, of and in all the said real estate (except an estate for the life of her the said *Sarah Gott* in certain estates therein enumerated); and that in consideration thereof, the said *Henry Thomas Gott* should immediately pay unto the said *Sarah Gott*, the sum of 10,000 *l.* in money, and make a demise to her for the term of 99 years, if she should so long live, of the other undivided moiety of the manor house, and premises, whereof her moiety was reserved to her for her life." After this recital, the deed witnessed, that in consideration of the said agreement and in performance thereof on the part of the said *Sarah Gott*, and in consideration of 10,000 *l.* in hand well and truly paid by the said *Henry Thomas Gott* to the said *Sarah Gott*; and also in consideration of the demise made, or intended to be made by the said *Henry Thomas Gott*, and also for and in consideration of the natural love and affection which she the said *Sarah Gott* had and bore to the said *Henry Thomas Gott*, and for other good causes and considerations her thereunto moving, she the said *Sarah Gott* granted and conveyed to the said *Henry Thomas Gott*, his heirs and assigns for ever, her undivided moiety of and in the said real estates in the counties of *Kent* and *Suffex*, (in the release described) and also of and in all other the manors, or reputed manors, messuages, or tenements, lands and hereditaments whatsoever, and real estate of her the said *Sarah Gott*, situate, lying and being in the said counties of *Kent* and *Suffex*, or elsewhere in the kingdom of *Great Britain*, to which she was, or should or might be entitled either in possession, remainder, reversion, or expectancy, or otherwise howsoever; with an exception of a life estate in the house of *Eggarton*, and certain lands in the indenture mentioned, to the said *Sarah Gott* and her assigns for life, she and they keeping the same in good repair and condition. And the said

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Sarah Gott was thereby made to covenant, not only for quiet enjoyment from thenceforth, but also that the respondent should receive to his own use all the rents, issues and profits then due, and thereafter to grow due. At the close of this indenture of release was a covenant in the following words, *viz.* “ and that “ the executors or administrators of her the said *Sarah Gott* shall “ and will, immediately upon her decease, deliver up unto him “ the said *Henry Thomas Gott*, his heirs, executors, administrators or assigns, the quiet and peaceable possession of all and singular the last beforementioned premises (being the premises “ reserved to her for her life), together with the several chattels “ stock and things used thereon, or with any part thereof, to “ and for his and their own use and benefit.” And on the back was a receipt for the 10,000 *l.* which *Sarah Gott* signed at the instance of the respondent.

By another indenture, bearing date the same 2d of *May* 1769, it was recited, that the respondent and the said *Sarah Gott* being seised or entitled in fee simple, in equal undivided moieties, of or to the manor house, messuages, lands and hereditaments therein after mentioned, and of other considerable real estates in the counties of *Kent* and *Sussex*, an agreement had been made between them for the sale of the undivided moiety of the said *Sarah Gott* of and in the same estates, subject to her life estate in her moiety of the manor house, messuages, lands, and hereditaments therein after mentioned, in consideration of the sum of 10,000 *l.* to be paid to her by the respondent, and of his making a demise to her of his undivided moiety of the said manor house, messuages, lands, tenements and hereditaments for the term of 99 years, if she should so long live; the respondent then demised his said undivided moiety to her for 99 years, if she should so long live, at a pepper-corn rent.

The respondent not satisfied with the conveyance which he had thus procured, came again to *Eggarton* about the latter end of the month of *July* following, and brought with him a deed poll, prepared and ready (as the other instruments had been) for immediate execution, and bearing date the 24th of *July* 1769. It recited, that the said *Sarah Gott* had lately sold and conveyed to the respondent, for certain considerations, all that her moiety of the manor of *Eggarton*, and capital mansion house,

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with the lands and estate belonging thereto, among other estates, lands and premises, in the counties of *Kent* and *Suffex*, and elsewhere within the kingdom of *Great Britain*, and that it was her intention, and so agreed by her, at the time of such sale, that all her plate, household goods, stuff and implements of household, utensils and things whatsoever, belonging to her about the said capital mansion house of *Eggarton*, and the lands thereto belonging, should be also bargained and sold to the respondent; and that he should have and enjoy the same, together with the estates in the said release conveyed, subject to her life estate therein: Then followed these words: "And because
"it may not be so fully expressed, and my mind and intention so
"clearly and explicitly declared by the said release as I could
"wish, and to avoid disputes and controversies after my de-
"cease." And then she bargained and sold to the respondent all the plate, household goods, stuff and implements of household, stock both dead and alive, and all other things belonging and appertaining to her, and that should be so at her decease, and be used with, or be in, about, or upon the said capital mansion house, lands and premises, or any of them; reserving the use thereof to herself for life; and concluding with a general warranty to the respondent.

At the time of executing all these deeds, *Sarah Gott* was confined to her bed, and remained in that condition to the time of her death; no draft or abstract of the deeds had been produced to her, or to any person on her behalf; nor were the deeds themselves read over by her, or to any of her friends; indeed, if an opportunity had been given her to read them, she was utterly incapable of doing it, on account of her infirmities; and though the respondent, to give the better colour to this part of the transaction, thought fit to say in his answer, that he left the deeds with her in the morning of the 2d of *May* for her perusal, whilst he went 15 miles further; yet this was positively denied by *Elizabeth Shindler* (Mrs. *Gott*'s waiting woman, and the respondent's own witness,) who said, that he did not go from the house and leave any deeds for Mrs. *Gott*'s perusal in his absence, but continued in her room. And though a receipt for the 10,000 *l.* was signed by *Sarah Gott* on the back of the release, yet no part of that sum was paid her; but the respondent prevailed upon her to accept his bond as a security for the payment of it, with interest at 4 *per cent.*

The

The person on whose advice *Sarah Gott* had for several years entirely relied in the management of her affairs, was the appellant Mr. *Francis Filmer* of *Lincoln's Inn*. This gentleman usually paid her an annual visit in the long vacation (either the latter end of *July* or the beginning of *August*), a circumstance which the respondent well knew, and consequently wished to procure a further ratification of his contract before the time of this visit. With that view he called again upon *Sarah Gott*, about the 24th of *July*, and paid her in advance 100 *l.* as the first quarter's interest of the 10,000 *l.* before it was become due, and at the same time got her to execute the last mentioned deed.

In the month of *August* 1769, the appellant *Francis Filmer* went to *Eggarton*; and till then, *Sarah Gott* had not apprized any friend of the transactions between her and the respondent; the demise and bond (which were the only instruments left by the respondent in her custody) were produced to Mr. *Filmer*; and in the conversation which then passed between her and him, he convinced her that she had been grossly imposed upon. She therefore immediately directed, that the respondent should be applied to for a production of the deeds which she had executed; and on his declining to produce them, a bill was filed in the Court of Chancery in *Michaelmas* Term 1769, charging, that *Sarah Gott's* moiety of the real estate was of the value of 20,000 *l.* and upwards; and that the personal estate comprized in the deeds was of considerable value; that she had been grossly imposed upon by the respondent, in whom she reposed confidence; and therefore praying, that the deeds or conveyances, or other instruments executed by her might be cancelled; and that the respondent might reconvey to her, all interest in her real and personal estate which he derived under any deeds or conveyances, or other instruments executed by her; and that he might redeliver to her all deeds, evidences and writings respecting the title of the premises, deposited with him by her, or any person or persons on her behalf, and for general relief.

The respondent, in his answer to this bill, stated the deeds before mentioned, and insisted on the fairness of the transaction. He said, that apprehending the estates might be better improved and managed, if the same were his sole property, he thought it would be prudent to purchase of *Sarah Gott* her undivided moiety,

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moiety, if she should be disposed to sell the same, at such price as might not lessen her income, and might enable her to fulfil her intention respecting the Miss *Hugessens*; and therefore he immediately, or very soon after the death of *Mary Gott*, mentioned to *Sarah* his inclination to purchase her undivided moiety; whereupon she told him, she did not choose to sell her share of the estate, because she was about to make, or had made her will, and had devised, or intended to devise the same to Miss *Hugessens*. He admitted, that no copy, draft or counterpart of either of the deeds executed by *Sarah Gott*, was produced, read or shewn, or offered to be produced, read or shewn to any agent or friend of hers, prior to the time when the same were produced to her for execution: He also admitted, that he did not, at any time antecedent to the execution of the said deeds, in any manner apprise any friend or even domestic of *Sarah Gott*, of his having agreed, or of his meaning or designing to agree with her for the purchase of the said estate and effects. He said he believed, that the whole of the timber trees growing on the said estate, exclusive of the *coppice wood* and *underwood*, were of the value of 1000 *l.* or thereabouts, and no more, to one moiety of which he was entitled; and he said he believed, that at the time of the execution of the said conveyance to him, the fee simple and inheritance of *Sarah Gott*'s undivided moiety of the said real estate in the county of *Sussex*, including the said timber, might be worth, to be sold, about 8000 *l.* or 8,300 *l.* and the remainder of the estate in *Kent*, subject to the estate for life of the said *Sarah Gott*, he rated at the sum of 1000 *l.* and the furniture, plate and out-door stock at 700 *l.* which sums making together 10,000 *l.* was, as he believed, the real, or near the real value of the premises so sold to him, at the time of such sale: And he concluded his answer, with insisting on the benefit of the said purchase.

The respondent having filed a cross bill against *Sarah Gott* for a discovery; she by her answer thereto said, that she being tired out with his importunity, though she never intended selling her estate, in order that she might not be troubled any more by him about it, at last consented to let him have her moiety; upon which he offered her 9000 *l.* and the *Eggarton* estate for her life, which he assured her was more than her estate was worth, but that she refused to take that price; however, con-

giving in a degree in the representation made of the value of the estate by the respondent, she told him he should have the said moiety at the price of 10,000 *l.* which sum, together with the proposed interest in the estate at *Eggarton* for her life, she said she then believed, relying on the respondent's account thereof, was the full outside value of the said moiety; and said that the respondent pretended to make a calculation, in order to shew that the price he offered was the full value of the said estate. But she positively said, that she treated with the respondent under an idea, that his account of the value of the estate was fair and honest; and that she intended him no favour or advantage in the bargain, more than what could be derived to him from his purchase of her moiety, at an extended outside price, as she always intended her fortune to go at her death to other objects; and said she told him, that as she knew nothing about the value of the estate, nor could judge of the contents of the deeds, she must depend entirely on what he said about them, and therefore hoped he would not impose upon her; and that she would sign the writings, but as Mr. *Filmer* would be with her soon, she should shew them to him and acquaint him with the transaction.

The cause being at issue, witnesses were examined on both sides; and the value of the property conveyed by *Sarah Gott*, being one of the essential points in dispute, several witnesses were examined as to that fact.

The witnesses examined for *Sarah Gott*, were *James Haffenden* and *Thomas How*, both of whom had for many years been employed in valuing land and timber, and particularly in the counties of *Kent* and *Sussex*; and they, in their depositions, valued *Sarah Gott's* real property comprised in the conveyance to the respondent, after giving in a distinct estimate of the farms, woods, coppices, &c. at 29,306 *l.* 15 *s.* out of which sum was to be deducted *Sarah Gott's* life interest, in so much of the *Kentish* estate, as was reserved to her, and which was valued by the respondent's witnesses, at 1000 *l.*

The witnesses examined on the part of the respondent, as to the value of *Sarah Gott's* moiety of the real estate (the principal of whom was *Edmund Chittenden* the respondent's steward) rated her moiety at 19,417 *l.* 10 *s.* out of which sum after deduction

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of 1000 *l.* (at which they rated the life estate reserved to *Sarah Gott* in the estate, by themselves valued at 195 *l. per ann.* though the rent was only 116 *l.*) there remained 18,417 *l. 10 s.* as the value of the property conveyed to the respondent for the price of 10,000 *l.* and this 18,417 *l. 10 s.* stood exclusive of the price of the personalty conveyed, which personalty the answer admitted to be worth 700 *l.* and which turned out in fact to be worth double that sum.

John Janes, the respondent's attorney, who drew the deeds, being examined on the respondent's behalf, said, that about the latter end of *April* 1769, the respondent acquainted the witness, that he had agreed with *Sarah Gott* for the purchase of her moiety of the estates mentioned in the pleadings, and also for the furniture, plate, china and stock in and about the house at *Eggarton*, for the sum of 10,000 *l.* and that over and besides this consideration, he had agreed to let her enjoy for her life the whole of her mansion house, with the farm and lands thereto belonging, and the respondent requested the witness to prepare the necessary and proper deeds and conveyances for carrying the said agreement into execution.

Elizabeth Shindler, a maid servant of *Sarah Gott's* who waited upon her person, and had done so for 20 years, on her cross examination on *Sarah Gott's* part, deposed, that on or about the 2d of *May* 1769, about three o'clock in the afternoon, the respondent came to *Eggarton* and brought some deeds with him; that he staid in *Sarah Gott's* room till about 7 or 8 o'clock in the evening, during which time the witness, as she went into and out of the room, saw some parchment deeds lie upon the bed there, but the respondent did not, during that time, go from the house, or leave any deeds with her for her perusal in his absence: She further said, that *Sarah Gott* could not in her then situation peruse and read over such deeds, without the assistance of some other person; and that she was not so assisted by any person, unless by the respondent. And on her examination on the part of the respondent, she also said, that when the respondent was at *Eggarton* in the beginning of *May* 1769, no conversation passed between *Sarah Gott* and the respondent in her hearing, touching the 10,000 *l.* but that about *September* following she heard *Sarah Gott* say, that she had agreed with the respondent

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spondent for the sale of her moiety of the estate for 10,000 *l.* and that he was to pay her 400 *l.* a year for her life; and after her death the 10,000 *l.* was to be paid to Miss *Hugessens*; she said, that *Sarah Gott* then told her, she would shew the agreement to Mr. *Filmer*, with whom she usually consulted in such matters, and that she had informed the respondent of such her intention. She further said, that *Sarah Gott* informed her, that she should not take the 10,000 *l.* of Mr. *Gott* until she had seen Mr. *Filmer*, to whom she should shew the agreement, and consult him thereon: That when Mr. *Filmer* came on a visit to *Sarah Gott's* house, *Sarah Gott* called the deponent up stairs, and desired her to get the papers out of the scrutore, and to give them to Mr. *Filmer*, which the deponent accordingly did, and that *Sarah Gott* and Mr. *Filmer* then expressed great dissatisfaction and disapprobation at the deeds; and both said that *Sarah Gott* had been imposed upon by the respondent, and that Mr. *Filmer* said Mrs. *Gott* should have consulted some person on her behalf. That several times afterwards, she heard *Sarah Gott* declare she had been imposed upon, in not having had the value of the estate; but said she never, before the time of *Sarah Gott's* conversation with Mr. *Filmer*, heard her declare any satisfaction or dissatisfaction respecting the deeds. She said further, that the respondent was a great favourite with the deceased *Mary Gott*; but she did not know of any particular regard or affection which *Sarah Gott* ever shewed to him. She likewise said, she had heard the respondent himself say, since *Mary Gott's* death, that he found he was not a favourite of *Sarah Gott's*.

Samuel Day, another witness, and one of the principal tenants of the estate, deposed, that in *May 1769*, he was at the respondent's house at *Brentford*, and had some conversation with him relative to a purchase which he had then lately made from *Sarah Gott*, of her moiety of the estate in question; in which conversation the respondent informed him, that one half of the estate having been given to him, he had purchased the other half of *Sarah Gott*, and thought himself himself happy in so doing, and having the whole estate his own: That the respondent said he hoped he had not given too much for it: That he had given 10,000 *l.* and that *Sarah Gott* would not herself make any price for it, but left the price to him; that he had first consulted his steward Mr. *Cbittenden* before he set the price. And the respondent

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dent further said, that if he had set the price at 20,000 *l.* he was afraid it would be too much; and if at 10,000 *l.* he was afraid she would think it too little; but that he did set it at 10,000 *l.* and she accepted it. That the respondent added, he was pleased he had bought it, because *Sarah Gott* was so open with him, as to declare that she never intended to give him any part of the estate in question; so that if he had not bought it, he should never have had it: That the respondent then asked the witness, what he thought of his purchase? To which the witness answered he thought it good one, and well worth the respondent's money.

On the 10th, 11th and 12th of *December*, 1770, the cause was heard before the Lords Commissioners for the custody of the Great Seal, when their Lordships ordered, that the parties should proceed to a trial at law, at the next *Lent* Assizes to be holden for the county of *Kent*, on the following issue: *viz.* "Whether
 " natural love and affection was really and truly any part of the
 " consideration of the indentures of lease and release, of the 1st
 " and 2d of *May* 1769, in the pleadings mentioned?" And the usual directions were given for that purpose; and the consideration of costs and all further directions, were reserved until after the trial of the said issue.

Sarah Gott, conceiving herself aggrieved by this decree, appealed from it to the House of Lords, and the appeal was set down to be heard: But she dying before the same came on, an order was made by their Lordships, dated the 13th of *March*, 1772, upon the petition of the present appellants, stating the will of *Sarah Gott*, and that the appellants were advised, it was necessary for them to exhibit a supplemental bill in the Court of Chancery, and to prove *Sarah Gott's* will there, and to have a decree of that Court to carry on the suit brought by her, before they could be entitled to prosecute the said appeal; that the appeal of the said *Sarah Gott* should be dismissed, but without prejudice to the present appellants bringing a new appeal, in case they should be so advised.

Accordingly the appellants, on the 2d of *May*, 1772, exhibited their supplemental bill in the Court of Chancery, against the respondent, and several persons who were the heirs at law

of *Sarah Gott*, stating the proceedings in the cause brought by the said *Sarah Gott*, and that she died on the 6th of *March*, 1772, having first made her will, dated the 2d of *July* 1764, whereby she devised her moiety of all the manors, messuages, lands, tenements and hereditaments, which she was entitled unto equally with her sister *Mary Gott*, to all and every the child and children of *William Western Hugessen*, Esq; deceased, lawfully begotten, to be equally divided between them, as tenants in common and not as joint tenants, and to the heirs of the body and bodies of all and every such child and children lawfully issuing, severally and respectively; and that if any such children should happen to die without issue, then she gave and devised the part and share, or parts and shares, of such of the said children who should so die without issue, to all and every other the child or children of the body of the said *William Western Hugessen*, equally to be divided between them, as tenants in common and not as joint tenants, and to the heirs of the body and bodies of all and every such other child and children, severally and respectively: And in case all such children but one, should happen to die without issue, then to such only child, and to the heirs of his or her body lawfully issuing; and for default of such issue, to the respondent, his heirs and assigns for ever. And the said *Sarah Gott*, by her said will, gave all the residue of her personal estate, (her debts and legacies being first paid) to the appellants *Edmund* and *Francis Filmer*, their executors and administrators, upon trust to place out the monies arising thereby, upon public or other good securities; and to pay the money so to be placed out, unto and amongst all and every the children of the said *William Western Hugessen*, in equal shares and proportions, if more than one, when they should respectively attain the age of 21, or days of marriage; and in case any of such children should happen to die, before their attaining such age or day of marriage, the share and shares of such child or children so dying, should go and be paid to the survivor or survivors in equal shares and proportions, if more than one: And if all such children but one should die, before his, her or their share or shares should become payable, then the same should be paid to such only or surviving child at the time aforesaid. And she declared it to be her will, that the interest and annual produce of such money should be paid to such child or children respectively, until the same should become payable, and in case all and every such child and chil-

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dren of the said *William Western Hugesen* should die before such age or marriage, then in trust for the respondent.—That the said *Sarah Gott* made a codicil to her said will, dated the 29th of *August*, 1768, whereby she revoked so much of the devise of her real estate as related to her moiety of the mansion house at *Eggarton*, with the lands and hereditaments thereunto belonging, or therewith used, and then in her occupation; and did thereby devise all her share of the said mansion house and premises, so in her own occupation, to the appellants *Edmund* and *Francis Filmer*, upon trust to sell and dispose thereof for the best price that could be gotten for the same, and to invest the money arising by such sale, in the purchase of other lands, tenements and hereditaments, to be limited to such and the same uses, as were by her said will expressed concerning her whole real estate thereby devised. That the said *Sarah Gott* made another codicil to her said will, dated the 16th of *November*, 1769, whereby she revoked the former codicil dated the 29th of *August*, 1768, and thereby confirmed her said will, and all and every the devises and bequests therein contained. And that the said *Sarah Gott* made another codicil to her said will, dated the 3d of *May*, 1771, whereby, after taking notice of her will, and that subsequent to the making thereof, she was prevailed upon by the respondent, to execute a conveyance to him of the whole of her real estate, (subject to a life estate to her reserved in part thereof) for the sum of 10,000*l.* which, relying upon his solemn assurances, and confiding in his honour and integrity, she then believed to be the full value thereof; and also taking notice that she had since discovered, that she was grossly imposed upon by the respondent, in the representation he so made of the value of the estate, and that he had greatly abused the confidence she had reposed in him, the estate being of far greater value; and that she had brought her bill in the Court of Chancery, praying that the said deeds might be set aside; and that she was minded and desirous to ratify and confirm her said will in all points, except as to the limitation in remainder to the respondent, which she intended to revoke; she did by this last codicil, not only republish, ratify and confirm her said will of the 2d of *July*, 1764, and every article, clause, limitation, matter and thing therein contained, except only so far as respected the ultimate remainder, thereby limited to the respondent, which she did revoke, and expressly declare to be null and void: But did also give and bequeath her whole estate, of what nature or kind

kind soever, whether real or personal, legal or equitable, unto such and the same persons, for such and the same estates, and to for and upon such and the same uses, trusts, intents and purposes respectively, as she had in and by her said will given, devised and bequeathed her real and personal estate therein named, except only the ultimate remainder thereby limited to the respondent.

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The appellants therefore, by their said bill prayed, that the witnesses to the will and last codicil of the said *Sarah Gott*, might be examined, and their testimony preserved; and that the said will and codicil might be declared to be well proved; and that the suit and proceedings by the said *Sarah Gott* against the respondent might be revived; and that the appellants might be at liberty to prosecute the same, and have the benefit thereof.

To this supplemental bill all the defendants appeared and answered, and the cause having been duly revived, the witnesses to the said will and last codicil of the said *Sarah Gott* were examined, and publication having afterwards passed, the supplemental cause came on to be heard on the 17th of *March*, 1773, when the Court made a decree, according to the prayer of the supplemental bill.

From the decree of the 12th of *December*, 1770, both parties appealed. In support of the original appeal it was argued, that though *Mary Gott* appeared to have paid great attention to the respondent, and actually to have disinherited her sister in his favour, yet there was no ground or colour to say that he was ever considered by *Sarah*, as in any degree an object of her affection and bounty, when set in competition with the appellants, the *Hugesens*; on the contrary, he himself admitted in his answer, that upon his first applying to her to sell him her moiety, she answered she did not choose to sell, because *she was about to make, or had made her will, and devised the same to Miss Hugesens*. Nor did this fact rest singly upon the respondent's admission, or upon *Sarah's* answer to his cross bill, wherein she swore, *that she intended him no favour or advantage in the bargain, more than what could be derived to him from being owner of her moiety*

J. Dunning.
Ll. Kenyon.
G. Hardinge.

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at an extended outside price. But there was also *evidentia rei* appearing on the face of her will, made near five years before; which shewed to demonstration, that she never intended any part of her estate for the respondent, so long as the Miss *Hugessens*, or any descendants from them should be living. That the transaction respecting *Sarah's* moiety of the estate, appeared from the whole of the evidence, to have been equally considered both by seller and purchaser, as a sale for a valuable consideration: The respondent himself referred peculiarly and exclusively to that idea in his answer, where he insisted and laboured to shew, that the price he was to pay was a full price; and he had measured it with so much parade of precision, as to use fractions in computing the separate values of the different estates, which when put together, were to amount, by his calculation, to the very sum mentioned in the deeds. His own attorney (the only person employed in the transaction, and who never saw *Sarah Gott* in his life) stated the instructions he received *from the respondent*, to prepare the conveyance, as instructions proceeding upon the idea of *a sale for a valuable consideration*, without suggestion or pretence from the respondent of any other consideration. The agreement itself, as stated in the release, imported a sale in consideration of 10,000 *l.* and the respondent so treated it, when he conversed with the witness *Samuel Day* upon the subject. There was not one tittle of evidence, that love and affection made any the smallest part of the consideration, except the bare expression in the deed, which was no more than *clausula clericalis*, absolutely unwarranted by the contract recited, as well as by the instructions proved; and utterly inconsistent with the case made even by the respondent himself in his answer, and with his declaration to *Day* the witness: And this after-suggestion, was so far from colouring over the respondent's case, that his resorting to it now, and chiefly relying upon it when driven from every other defence, was a further and glaring proof of the imposition, and a double hatching of the original fraud.

To consider this transaction then as a mere sale, a grosser fraud was never perpetrated, *Mrs. Gott* was an old lady, who had for years been confined to her bed; the bargain was made, and the conveyance executed in the dark; no friend of hers, no indifferent person of honour and skill consulted on her part; the interval between the bargain made, and the conveyance executed,

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was unnaturally short; the respondent's extraordinary expedition was quite unaccountable, upon the idea that he thought the bargain a fair and honest one; the manner in which the deeds were drawn, and the price was to be secured, *a bare personal security by bond*, was prescribed by the respondent himself; the operative part of the deed was a curiosity, it extended infinitely further than the recited agreement, and conveyed *all the estates which Sarah Gott might have in possession, reversion, remainder or expectancy within Great Britain*; it passed also by express words, *the arrears of rent due to her*, and comprehended *the stock on the farm, household goods, &c.* though there was no evidence to shew, that these articles were at all the objects of the contract, either expressed or implied; the value, according to the estimate of the appellants witnesses, was nearly *three times* the price to be paid; and the respondent's own witnesses (*whose valuation was under 27 years purchase at the present rents, though it was admitted none of them had been raised within the memory of any man living*) valued the lands at nearly *double* the price which was to be paid for them; so that taking the value at a medium between the two estimates, the whole estate, including both moieties, might be fairly and moderately computed at 50,000*l.* notwithstanding which, and though it was clear from the wills of the two sisters, that as *Mary* intended her moiety for the respondent, *Sarah* designed hers for the Miss *Hugeffens*, the respondent would by his dextrous management and contrivance, if his bargain was permitted to stand, possess himself of four parts in five, or 40,000*l.* and leave only 10,000*l.* for the *Hugeffens*; who as infants too, were more peculiarly the objects of equitable interposition and redress, against a bargain so preposterous in itself, and so greatly to their prejudice. These circumstances, added to the *confidence* which, as it appeared from the transaction in general, and *Day's* evidence in particular, the old lady reposed in the respondent, afforded the most ample ground to declare, that the conveyance was obtained by fraud and imposition.

Should it however be insisted, that *Sarah Gott* had ratified the agreement, by the subsequent acceptance of a quarter's interest; it must be observed, that the payment of that interest betrayed a consciousness in the respondent, that his contract stood in need of such evidence of acquiescence, or something like it, on the part of the old lady; as no other reason could with any colour

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of probability be assigned, for his paying this quarter's interest *in advance*. But nothing could be inferred to palliate the fraud, from her acceptance of this payment; since, in accepting it, she acted upon her then impression of the nature of the transaction. He had assured her, that the price for which he gave his bond, was the full value; she gave a blind and implicit credit to this assertion; and all her behaviour prior to the time of her being undeceived by Mr. *Filmer*, proceeded upon that ground: But from that period, the witnesses agreed, she uniformly held a different language, and made repeated complaints of the imposition. Upon the whole, if any issue was proper to have been directed, it ought to have been a general issue, as to the fairness of obtaining the conveyance and the other deed. The present issue might not be decisive of the merits of the case; and by the manner in which it was directed to be framed, it might let in the respondent to insist, that the appellants were in a Court of law estopped by the indenture, to say that love and affection were not part of the consideration, that deed having expressed the affirmative. But upon all the circumstances of the case, already proved, the fraud was so apparent, that no issue, or further enquiry into the fact in any shape, was apprehended to be necessary or proper; the former appellant *Sarah Gott* had a right in Equity to immediate relief according to the substance of the prayer of her bill; and the present appellants, to whom that right was derived, were now entitled to a reversal of the Lords Commissioners decree, and to such other directions as might relieve them against a bargain so unconscionable, and procured by so rank an imposition.

E. Thurlow.
A. Wedderburn.
J. Morton.
J. Madocks.

In support of the cross appeal it was said, it could not be disputed, but that the consideration of love and affection between the parties, would have been good and sufficient in law to have established the deeds in question, without any pecuniary consideration. That an alliance in blood between the respondent and *Sarah Gott* was admitted by her, and it was clear that he was taken to be her presumptive heir at law; and in fact was the only person in the line of succession to her, with whom she had any acquaintance. That the devise of her sister's moiety of the estate to him, clearly suggested to her the idea of preserving the whole entire in his person, as the representative of her name and family; and the object she pursued was, not to acquire

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quire the largest possible price for her land, but such a sum only as might be sufficient for her other relations. The conditions and terms of the treaty evidently shewed that this was her purpose. She meant to make a *bountiful*, and not a *hard* bargain with him; and no evidence in the cause tended to raise any just ground of doubt against the actual existence of the consideration, solemnly assented to by the unimpeached execution of the deeds. And with respect to all other grounds on which the respondent's several transactions with Mrs. *Sarah Gott* were attempted to be impeached, there appeared no evidence whatever to induce a proof of fraud, so as to set aside the conveyance; as it was expressly in proof, that she was, and so continued for several months, *well satisfied with the transaction*. Her answer admitted, that she might have sent for whom she pleased, and that the respondent asked her, if she wished to have any particular person or persons to be present as witnesses to the execution of the deeds; and that previous to the execution of them, she told the respondent, that she should very soon acquaint her friend Mr. *Filmer* with the whole transaction, and consult him on the properest means of disposing of her money, for which she admitted she desired the respondent to give his bond. It was impossible therefore to conceive, that he transacted any part of this business under a confidence, or even belief, that any impropriety in his behaviour could be protected, by any secret or sinister management whatever on his part: And it was now evident from the proceedings stated by the present appellants in their supplemental bill, that at the time of the treaty being made and carried into execution, *Sarah Gott* had so far considered the respondent an object of her affection and regard, as to have devised all her estate to him in fee, on failure of issue of the bodies of Miss *Hugessens*, then infants of tender years; and that more than six months after the sale of the estate, sought to be impeached by *Sarah Gott's* original bill, and even after she had filed that bill, she executed a codicil to her will, whereby she ratified and confirmed the same, and all and every the devises and bequests therein contained. From whence it was manifest, that the testatrix could not entertain the most remote idea, that the treaty for, or subsequent sale of the estate, had been begun, carried on, or completed by any fraudulent or sinister means, on the part of the respondent; and it was equally manifest, that the consideration

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ration of natural love and affection, was a real active motive upon her mind at the time of the treaty and sale. Lastly, that a difference of opinion as to the value of an estate, or even a price clearly inadequate, was no just ground to set aside a sale between absolute strangers; but where other circumstances of affection, or fancy, appeared to have had a considerable influence, there was no reason for trying the merits of the transaction, by the opinion of a land surveyor. That the respondent being confident, that the merits of his case would stand the test of the enquiry, which the Court had thought fit to direct for its own information, did not object to the trial of the issue as between the original appellant and himself; but the state of the case being altered by her death, and the proofs on his part corroborated by the several testamentary papers set forth in the supplemental bill, he had presumed to present a cross appeal, praying, that the decree of the 13th of *December* 1770, might be reversed, and the bill against him dismissed.

DECREE
affirmed.
M. S. Jour.
sub anno
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p. 69.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein respectively complained of, affirmed. *

Case 10. *Alexander Donaldson, and John Donaldson, Appellants.*

Thomas Becket, and others, - Respondents.

22d February 1774.

JAMES THOMPSON Esq; deceased, was in his lifetime the author of a tragedy called *Sophonisba*, and also of a poem intitled *Spring*.—In *January* 1729, *Andrew Millar*, deceased,

Register, *Lib.*
A. 1775.
p. 305.

* In consequence of this affirmance, the issue was tried at the Summer assizes of 1774, when the jury found a verdict, that natural love and affection was not really and truly any part of the consideration of the deeds of *May* 1769. And on the 22d of *March* 1775, the Lord Chancellor *Bathurst*, on hearing the cause upon the Equity reserved, declared that those deeds ought to be set aside for fraud and imposition, and decreed the same accordingly; with the consequential directions, as to delivering up possession of the premises, accounting for the rents and profits, and paying the costs both at law and in equity.

contracted

contracted with Mr. *Thompson* for the purchase of this tragedy and poem; and by indenture dated the 16th of *January* 1729, Mr. *Thompson*, in consideration of 137*l.* 10*s.* paid to him by *Millar*, did assign to *Millar*, his executors, administrators and assigns, the *true copies* of the said tragedy and poem, and the sole and exclusive right and property of printing the said copies for his and their sole use and benefit, and also all benefit of all additions, corrections, and amendments which should be afterwards made in the said copies.

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Mr. *Thompson* was also the author of several other poems, intitled *Summer, Autumn, Winter, Britannia*, a poem sacred to the memory of Sir *Isaac Newton*, an Hymn on the Succession of the Seasons, and an Essay on Descriptive Poetry: And in consideration of 105*l.* which by a receipt under his hand, dated the 28th of *July* 1729, he acknowledged to have received from Mr. *John Millan* Bookseller, Mr. *Thompson* sold to *Millan* the copies of the said several poems, with the sole right of printing and publishing them, together with such alterations and additions as the author should afterwards occasionally make.

About *June* 1738, *Andrew Millar* contracted with the said *John Millan* for the purchase of the several poems last mentioned, so sold to him by Mr. *Thompson*; and by an indenture dated the 16th of *June* 1738, *John Millan*, in consideration of 105*l.* paid to him by *Andrew Millar*, did assign to the said *Andrew Millar*, his executors, administrators and assigns, the several copies of the said poems, with all the corrections, alterations and additions which the author had made or should make; and all the right, title, interest, property, claim and demand of the said *John Millan* to or in the said copies; and also the several plates of the prints of the seasons, and the plate of the print of Sir *Isaac Newton's* monument; all which prints had been usually bound up with the said poems.

By virtue of this indenture, *Andrew Millar* became lawfully entitled to all the profits arising by the printing and publishing of the several poems beforementioned, and to all the sole and exclusive property and right of printing copies of them, and of vending and disposing of the same.

Andrew Millar died in *June* 1768, having first made his will, dated the 20th of *February* 1768, and thereof appointed his

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wife *Jane Millar*, *William Millar*, *Thomas Longman*, and the respondent *Thomas Cadell* executors. And soon after his death, his will was duly proved by his widow, and the said *William Millar* and *Thomas Cadell*, who thereby became entitled to the several copies of the poems before mentioned, and to the sole right of printing, publishing and vending the same.

On the 13th of *June* 1769, the copy right of the said several poems, with the sole right of printing, publishing, and vending them, was sold by order of *Andrew Millar*'s executors, by auction, at the *Queen's Arms Tavern*, in *St. Paul's Church-yard*, *London*: And at this sale the respondents purchased the copy-right of the said poems in certain proportions, for 505*l*.

After this purchase of the copy right in the said poems, the appellants published and sold several thousand copies of the poems called *Spring*, *Summer*, *Autumn*, and *Winter*, and the hymn on the succession of the seasons, in a volume intitled *THE SEASONS*, by *James Thompson*; *Edinburgh*, printed by *A. Donaldson*, 1768; and thereby acquired considerable profits, to the great loss and prejudice of the respondents. Whereupon the respondents, on the 21st of *January* 1771, filed a bill in Chancery against the appellants, thereby stating the several facts before mentioned, and praying, that the appellants might come to an account with the respondents, for the money which the appellants had received by the sale of the said poems and hymn; and that the appellants might for ever after be restrained, by the injunction of the Court, from publishing the said poems and hymn, and from selling any copies of them in future.

On the 16th and 20th of *July* 1771, the appellants put in their answers, and thereby admitted, that Mr. *Thompson* was the author of the several poems mentioned in the bill, but denied all knowledge of the several assignments which the bill stated; and said they believed, that *Andrew Millar*, by virtue of the several indentures mentioned in the bill, or by any other means, did not become entitled to the copy right in the poems before mentioned, for a longer time than the several terms limited by an act passed in the eighth year of her Majesty Queen *Ann*, intitled, *An act for the encouragement of Learning, by vesting the copies of printed books in the authors or purchasers of such copies,*
during

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during the times therein mentioned. The clauses relied upon in the answers of the appellants were, that by which it is enacted, "that the author of any book or books, then already composed and not printed or published, or that should thereafter be composed, and his assignee or assigns, should have the sole liberty of printing and reprinting such book, and books, for the term of fourteen years, to commence from the day of first publishing the same, and no longer." And a proviso, by which it is further enacted, "that after the expiration of the said term of 14 years, the sole right of printing and disposing of copies shall return to the authors thereof, if they are then living, for another term of 14 years. The appellants in their answers also said, that the copies of the several works, in the bill mentioned to have been written by Mr. *Thompson*, having, as appeared by the bill, been assigned by him and first published in 1729, the sole right of printing, publishing and selling the same, could not be extended beyond the term of 28 years, from the time of such first publication, which term expired in 1757. They denied, that during that term they were concerned in the printing, publishing, or selling any copies of the said works. They admitted the death of *Andrew Millar*, and that before his death he made his will, and appointed such persons executors, as in the bill were named; and that it was proved in the manner therein mentioned. But they insisted, for the reasons aforesaid, that the executors of *Andrew Millar* did not by his will, or otherwise, become entitled to the sole right of printing and publishing the said poems. The appellants also admitted, that they had since the expiration of the said term of 28 years, without the consent of the respondents, printed, published and sold several copies of the poems in the bill mentioned; and insisted, that unless the respondents were able to make out a title to the sole and exclusive property of the said poems, paramount the aforesaid act of parliament, the appellants were, by virtue of that act, well authorised in printing, publishing and selling the said poems, and were not compellable to account for or discover the number of copies they had printed, published or sold, and ought not to be restrained from the further publication and sale of the same; and therefore they claimed the benefit of the said act of parliament, as if they had pleaded the same in bar to the relief and discovery sought by the bill.

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On the 16th of *November* 1772, the cause was heard before the Lord Chancellor *Bathurst*, when his Lordship was pleased to decree, that the injunction which had been before granted in the cause, should be made perpetual; and that it should be referred to the Master, to take an account of what had been received by the appellants, or either of them, or by any other person by their order or for their use, from the publishing and sale of the poems in the pleadings mentioned, and that the appellants should pay the respondents what should be found due to them on the balance of the said account; and his Lordship reserved the consideration of costs, until the Master should have made his report; and any of the parties were to be at liberty to apply to the Court, as there should be occasion. *

In

* After thus stating the facts of the case now in judgment, the appellants, previous to assigning any reasons in support of their appeal, made the following observations.

On this state of the case they said it was observable, that the respondents derived a title through executors, *eo nomine*; and not by means of any specific devise to them. From hence it was conjectured, that they meant to claim some *chattel* or other, and to complain of a wrong done to that species of property. Of chattels it is certain, that they all go absolutely to executors, together with all the rights which can exist in them. The case is the same of rights purely incorporeal, which lie *only in action*, and are independent of any subject, real or personal, if they are for terms of years, as an annuity, a franchise, or a privilege, such as monopolies, &c. for a limited time. But it was conceived, that a perpetual annuity, franchise, or privilege, must be a fee simple, and descend to heirs. If this be so, the main difficulty would then consist in ascertaining the chattel claimed by the respondents, and how and in what manner the wrong complained of applied to it.

The bill in this cause was penned by the respondents with extreme caution, solicitous, as it should seem, to avoid entangling themselves in a variety of circumstances, which yet make part of the special verdict in the cause of *Millar v. Taylor*, and in the report of Sir *James Burrow* * are stated to be highly material, although in support of that opinion no reason is alledged. It might therefore be inferred, that the present attempt was an experiment, to try how far the doctrine of that case may be extended beyond the case itself. What was done with the poems in question, between the time of their being first written, and the 16th of *January*, or the 28th of *July* 1729, when the copies were sold, did not appear in any part of these proceedings. The respondents had not thought fit, in support of their claim, to alledge, that the author had neither published, sold, or given *true copies* of them to other persons, before those particular days; indeed such an allegation could not have been made with truth, because it was notorious, that they were published at separate and distinct times, as they happened to be written. The *Seasons* in particular, were found by the special verdict in the cause of *Millar v. Taylor*, to have been published

In order to obtain a *final* determination of this great question of literary property, the present appeal was brought; and on behalf of the appellants it was said, that the object contended for by the respondents, was of so abstruse and chimerical a nature, that

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E. Thurlow.
J. Dalrymple.
A. Murphy.

published in the year 1727, at *several times* between the beginning of that year and the end of the year 1729, and of course many *true copies* of them were sold to various persons, before the purchases by *Andrew Millar* and *John Millan*, supposed by the bill. But it was immaterial to the present claim, in what manner, or with what view the author published originally, since if any property adhered to him after, and notwithstanding his first publication, the same, without any manner of doubt, was disposeable by him at his pleasure. Upon the same principle, the respondents had industriously declined to charge, that the said *James Thompson* was a natural born subject, or resident in that part of Great Britain called England; or that the poems in question were first printed and published in the city of London, the same having never before been published elsewhere; meaning apparently to insist, that the right which they claimed, being derived from property, could not depend for its existence on such accidents; and that therefore, this case had to do with that of foreign books, which do not, in their apprehension, stand on a different footing from copies printed and published in the city of London. The respondents had, for the same reasons, declined to charge, if the truth was so, that the work now in question, was upon the said purchases of the several parts thereof, by the said *Andrew Millar* and *John Millan* respectively, and before the publication thereof, duly entered in the Register of the Company of Stationers of the city of London, as the whole and sole property of the said *Andrew Millar* and *John Millan*; to avoid the appearance of recourse to a statute made in their favour, but now under the ill luck of being thought an impediment. And by the omission of these circumstances, the respondents no doubt intended, for reasons sufficiently obvious, if the foundation of their argument was found, to insist, that the species of right to which they set up their claim, was not liable to a supposition that the author had relinquished the copy, and consequently given a general licence to print. They denied that many of the best books fell under that description, and that a very little evidence might be sufficient, after the author's death, to imply such a tacit consent; as, if the book had not been entered before publication, it would be a circumstance to be submitted to a jury, that the copy was intended to be left open. In fact *Mr. Thompson*, their author, died in 1748, and they disregarded the rest of the inference; but had they admitted the circumstance above stated to be material to themselves, it would have been equally so to the author, who likewise omitted to enter his poems in the Stationer's Register. For the same reason the respondents had not pretended, that from the time of the said two several purchases, *Andrew Millar* and *John Millan*, and the executors of the former, and their assigns, had printed and sold the said works as their property, and constantly had a sufficient number of books exposed to sale at a reasonable price. To their unbounded claim of property it was certainly repugnant, that the owner should be obliged to part with it at any price, but that which he sets himself. Nor would they admit, that their relief might be rebutted, by shewing that they meant to enhance the price, which is against law. The statutes of 1 *Rich. III.* and 25 *Hen. VIII.* relate to the importation of books from foreign parts, and extend in no case to property or privilege; and the price

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that it was hardly capable of being defined. It was sometimes called *property*, and for the sake of distinction, *literary property*. The

of books has nothing to do with *ingrossing*, *forestalling*, *regrating*, or any other offences against the police of a public market. The respondents had likewise forbore to charge, that *before the reign of Queen Ann, it was usual to purchase from authors the perpetual copy right of their books, and to assign the same from hand to hand for valuable considerations, and to make the same subject to family settlements, for the provision of wives and children*; as judging perhaps, that if such a property had *always existed* at common law, the purposes to which it had been applied would be perfectly immaterial; and if it did *not exist*, the application of it to family interests, would not be a sufficient ground, to build up a *new and unheard-of property*; perhaps conceiving, that *what was done among others*, would not be received as evidence in the Court of Chancery; and perhaps convinced, that no such usage could be proved, or that such usage, if stated in all its circumstances, would be seen advantageous to booksellers only, and not to authors, and upon the whole might turn out just so much of nothing to their purpose. They had likewise avoided to charge any supposed *bye-laws* of the Stationer's Company; aware perhaps, that such *bye-laws* would imply a special right *created* by themselves, and extending only to their own members; perhaps considering, that the appellants not being members of that Company, would not be affected by such *bye-laws*, even to the extent of making them competent evidence; and perhaps apprehending, that such *bye-laws* would throw a light upon the imaginary usage above mentioned, and by revealing the origin, nature and extent of the property contended for, point the force of it against their own argument.

The question therefore before the Court of Chancery, stood in this simple form; whether the author having sold and delivered, for a competent price, *one, or five hundred true copies* of his work, retains in each of the copies so sold and delivered, by the true construction of such contract, the *mere and absolute dominion* and property, conveying to the *vendee* no more than a special limited use thereof; or *à converso*, whether such *vendee*, or rather *baillé*, acquires by the true construction of the contract of sale and delivery, no absolute property to *himself*, but only a right of using, to a certain extent, the property of *another*? If this proposition be maintainable by the respondents, the consequence insisted upon is, that in respect to the property so retained, the mere and absolute owner, *viz. the person who has sold*, may maintain an action for the exclusive use of it by the *baillé*, *viz. the buyer*. But to avoid the difficulty of making out the whole of this idea, some have taken part of it, and they divide it thus: Every book, they say, consists of two distinct parts; the material part, namely, the paper, print, and binding, which is a manufacture; and the immaterial part, namely, the doctrine contained in it, which is the facture of the mind. The property in the material part, passes according to the law in all other cases; but the property in the immaterial part, remains to the author; which is about as intelligible, as if one should state *John* to be the owner of the *carcase* and *limbs* of a horse, and *Thomas* the owner of his *colour, shape, speed and mettle*. This seems to have led to an elaborate discussion of the principles of property; whether it could exist in an idea, for want of substance, physical locality, distinguishing marks, and

The word *property* has various significations. In a philosophical sense, the qualities inherent in any subject, or thing, are called its *properties*. In a civil sense, *property* is *corporeal* or *incorporeal*. Corporeal property is the actual possession of some substance, with the power of enjoying and disposing of it: But the object now contended for, was not *corporeal property*. Incorporeal property is of two sorts: 1st. It is a right relating to some substance, as a right to take the profits of land, without having the possession of the land, or a title to it. 2dly, It is a right to exercise some faculty, or to do some particular thing for profit. The perception of the profits, is a taking of some substance or *corporeal property*; and hence the *incorporeal right* is metaphorically called *property*. The word thus used becomes equivocal, importing alternately the *right*, and the *profits* resulting from the *right*. In like manner, *land* and the *right* to it, are both called *property*. If the respondents object was an *incorporeal right*, it is a mere right to do some particular thing for profit. The thing to be done, is the *multiplying of copies of books*.

many other enquiries of the same abstract nature. A mere *scio-machina*, wherein, by no uncommon accident, the absurdity of the position made a serious answer seem ridiculous. Some have stated the *property* to exist in the profits of the sale, which, as they assume for the purpose, belong to the original author. But this is only substituting another, and as it seems, a less proper phrase, in the place of the word *monopoly*, which, to use the words of *Brook*, is *property not properly known*. The privilege however, of monopoly, is an interest or estate well known to the law. It only remains to shew, what title the author has to it. Some have contented themselves with declaiming upon the *moral fitness*, the *reasonableness*, the *justice* and *public convenience* of putting into the hands of an author, the means of raising upon the world for his own profit, the utmost sum of money for the use of his book, and this can only be done by giving him a *monopoly*. Now if the truth of all this were admissible and clear, it would prove at most that it *ought* to be done, not that it *has been* done, and that those who alone *can* do it, ought to consider and pronounce upon it. But in fact, *they* have considered of it, and pronounced upon it otherwise. Some contend, that such a monopoly is already established by law, and appeal to usage for the proof of it: But the usage adduced is incompetent, for want of time beyond memory, and in truth does not exist, as appears abundantly by the instances produced to prove it. Some draw their proof of the common law, from the injunctions granted by the Court of Chancery; admitting, or rather insisting, that such injunctions ought to be granted *only*, where the common law is known and clear; admitting also, that the case is *new* to the common law, and was therefore properly sent thither by the Court of Chancery. After which, it will not be wonderful, if injunctions granted in a Court of Equity, should not be thought an indisputable proof of the Common law.

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The sole right of multiplying copies, is a sole right to exercise a *natural faculty*; and this, it is obvious, is an *extraordinary privilege*. A sole right to take the profits arising from the exercise of a natural faculty, is a *monopoly* in itself very extraordinary. This *privilege* and this *monopoly*, the respondents chose to call their *property*, and they were to maintain their title to it at *common law*. But by that law, it was submitted on the part of the appellants, that the privilege and monopoly never did, nor ever could exist. For a right at common law, must be founded on principles of *conscience* and *natural justice*. Conscience and natural justice, are not local, or municipal. Natural justice is the same at *Athens*, at *Rome*, in *France*, *Spain* and *Italy*. Copies of books have existed in all ages, and they have been multiplied; and yet an *exclusive privilege*, or the *sole right* of *one man* to multiply copies, was never dictated by *natural justice* in any age or country; and of course the *sole liberty* of *vending copies* could not exist of *common right*, which gives an equal benefit to all. An *exclusive privilege* to exercise a *natural faculty*, is an encroachment upon the rights of man. A *natural faculty* differs from the execution of an *office*. An *office* is the work of civil policy, and being of *positive institution*, may be granted to *one*, without injury to the rest; but when that which of *common right* should be free to all, becomes confined to any *one man*, or any *body of men*, the rest of the community suffer an abridgement of their natural liberty; and such a restraint of the liberty of many, for the sake of one, was never established by natural justice. If it ever has existed, it has been the creature of the *civil magistrate*, upon principles of policy; but the respondents disclaimed the aid of the *Legislature* upon the present question, and derived their claim from the *common law*.

The common law has ever regarded *public utility*, as the mother of *justice* and of *equity*. Public utility requires, that the productions of the mind should be diffused as wide as possible; and therefore the common law could not, upon any principle consistent with itself, abridge the right of multiplying copies. When the common law took root in this kingdom, literary composition stood, in regard to the manner of making it public, upon the same footing as in *Greece* or *Rome*. *Writing* was, in those states, *the only method* of multiplying copies. To transcribe,

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scribe, or copy out a book, was the right of every individual; there was no other way of propagating knowledge: But of a perpetual right in one man to write out books, or to make copies, there is not a single trace in any author that has come down from antiquity. *Atticus* retained a number of slaves, who were trained up to writing; and it appears in *Tully's* Epistles, that *Atticus* transcribed not only for his own use, but to sell again to *Cicero*. In like manner the natural liberty of transcribing books, was never checked by the common law. From *Ames*, and other compilers of the history of letters, we learn, that from the slow progress of transcribing, books were held up at an enormous price. *Livy* was sold for 120 crowns of gold for each book; and a *French* Romance, called *La Romans de la Rose*, was sold for 33*l.* 6*s.* 6*d.* The common law could not, with justice, uphold a price so prejudicial to the cause of learning. Accordingly, he who possessed a *Bracton*, or a *Chaucer*, had an undoubted right to make as many *true copies* as he pleased. A monopoly would have been pernicious, and learning, in consequence, must have gone to ruin. The common law is *immemorial usage*. If therefore there was a time, when the privilege and monopoly now contended for, could not, and in fact did not exist at common law, they never can exist by that law. But such a time has been, namely, from the beginning of our history, down to the GREAT ÆRA of printing; and printing, which is only a more expeditious method of multiplying copies, could not change the principles of right and wrong, or innovate the law. Printing was invented at *Mentz* in *Germany*, anno 1458. In 1471, *Caxton*, a mercer of *London*, brought the art into this kingdom. In acts of Parliament it is called a *trade*, or *manufacture of the kingdom*. To exercise the art, was the right of the subject; and in this light the first printers considered it. *Chaucer's* works were printed by *Caxton* in 1498, when the author had been long dead. Another edition of *Chaucer* was soon given by *Thomas Godfrey*. *Littleton's* Tenures were printed in 1481, by *John Lettou*, and in a short period by *Richard Pinson*, 1526, by *Thomas Bertbelet* in 1530, by *William Rastall*, in 1534, and by *Robert Redman* in 1540. *Pinson*, indeed says, in the wit of that age, that *Redman* should be called *Rudeman*; *quia hominum Rudiores vix invenias*. He abuses *Redman's* edition, but not a word about an invasion of property.

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But it is said on the part of the respondents, that the name, *copy of a book*, has been a term used for *ages*, to signify the *sole right* of printing, publishing and selling; and that this species of property has existed in usage, as long as the name. But as the respondents admit, that there is no bye-law or ordinance relative to copies, till after the year 1640; the usage, whatever it be, is therefore not immemorial.

It is also said, that from the erection of the Stationer's Company, copies were entered as *property*, and *pirating* was punished. The common law, according to this, begins with the Stationer's Company. The first charter was in 1556, 3d and 4th *Philip and Mary*, and was founded on principles of bigotry; *to prevent*, as it recites, *the renewal of great and detestable heresies*. The new members of the Company, in number 97, were made *literary constables* to search for books, &c. and though the Crown had no right over the trade of printing, it was ordered, "That no man should exercise the mystery of printing, unless he was of the Stationer's Company, or had a licence." To this Company so constituted, and thus armed with a *general warrant*, we are referred for evidence of the common law.

But it is further said, that in the year 1558, the charter was confirmed, in the 1st of *Eliz.* and that in that year, there are *entries of copies* to particular persons, and down from that time.—To this it is answered, that patent rights began soon after the first introduction of printing. *Froissart's Chronicles of England, France and Spain*, were published *cum privilegio a Rege indulto*, by *Richard Pinson*, 1525. From that time, the patents *ad solum imprimendum* were innumerable. Men who had such rights, might enter their books as *property* in the Stationer's Register; but neither the *patent* or the *entry*, can be received as evidence of a *common law* right. The charter embraced all the printers in *England*: The new Company had the sole privilege of printing, and they agreed to divide the spoil amongst themselves; but authors *were not parties* to the agreement.

Still it is said, that the Stationers Company was empowered to make bye-laws.—They were so; and those bye-laws might create a *relative right* among the members of the Company. In 1681, a bye-law declares, that where a book was entered to any member, such person, *by ancient usage of the Company*, has been
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reputed and *taken* to be the *proprietor*. By *ancient usage of the realm*, had been more conducive to the point. But it was not competent to the Stationer's Company, to make laws for the rest of the kingdom; and if it had, it would *not* be *common law*.

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But the decrees of the Star Chamber have been cited as strong authorities, in support of the bye-laws and customs of the Stationer's Company; and that a Star Chamber decree in 1637, expressly supposes a copy right to exist, *otherwise* than by *patent, order or entry*: which could only be by *common law*. The Star Chamber was a *criminal court*, and had not constitutional authority to determine *civil rights*. That Court has long since been abolished, without regret; and it is the happiness of the subject, that the common law has flowed through *purser* channels. The relative rights of the Company were supported *per fas et nefas*, in those times of high prerogative: *Licences* from the Archbishop of *Canterbury* were frequent; and such licences were neither *patent, order, or entry*. Moreover, a common law right is never expressly mentioned in any *ordinance, proclamation, or bye-law*. It is often called the *right, privilege, authority, or allowance* solely to print. Had the Star Chamber, and the High Commission Court, expressly stated a common law right, it could not be received as an authority in point; and a common law usage cannot arise by mere implication from dark hints of the Star Chamber. The same argument applies to acts of the Privy Council, to edicts, proclamations, the ordinance of the Two Houses in 1642, and all the ordinances during the usurpation. This whole body of precedents forms the history of *despotism*, but not of the common law. The most that can be said in their favour is, that they supported an usage, first set on foot by *acts of state, by patents, bye-laws, &c.*

It has been said, that in those times, copies were protected by a much speedier and more effectual remedy, than actions at law, or bills in equity; namely, the *licensing act*, whereby the printing of any book *without consent* of the *owner* was forbidden; and that soon after the expiration of that act, it appears by *Lilly's Entries, p. 67*, that in *Hil. 31 Car. II.* there was a case of *Ponder v. Bradyll*, for printing 4000 copies of the *Pilgrim's Progress*, where of the plaintiff was proprietor. One successful ac-
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tion at law would have been a better proof of the right, than a thousand instances of arbitrary power. The *ownership* was created by patent, order, bye-law of the Stationers, &c. and if the licensing act recognized a right *so created*, it was an act of the *Legislature*; but this act, with all the other encroachments upon liberty, has long since gone to rest, to revive no more. And as to the case of *Ponder v. Bradyll*, it is no more than a *declaration*, in the book of a *special pleader*; and if the defendant printed and exposed to sale 4000 books, he was left in possession of them.

But the respondents, as if conscious that the ground of bye-laws, ordinances, &c. is not tenable, resort to a Court of Equity; and rely much upon the injunctions which have issued out of the Court of Chancery. These injunctions may be all drawn into a narrow compass, and it will be seen, that they do not apply to the point in question.

I. *Injunctions before the 8th Ann. c. 10.*

15th November, 1681. Stationers v. *Lee*, for printing Psalters and Almanacks.

17th November, 1681. Stationers v. *Wright*, for publishing Almanacks.

9th and 22d February, 1709. Stationers v. *Partridge*, for selling Almanacks.—All these are prerogative rights.

II. *Injunctions upon the Right given by the Statute of Queen Ann.*

9th November, 1722. *Naplock v. Curl*, for printing *Pri-deaux's* Directions to Church Wardens.

11th December, 1722. *Tonson v. Clifton*, for Sir *Richard Steele's* Conscious Lovers.

19th and 23d May, 1729. *Gulliver v. Watson*, for printing *Pope's* Dunciad.

26th November, 1735. *Motte v. Falkiner*, for *Pope* and *Swift's* Miscellanies.

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27th January, 1736. *Walthoe v. Walker*, for *Nelson's Festivals*.

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6th December, 1737. *Ballex v. Watson*, for *Gay's Polly*.

13th March, 1740. *Gyles v. Wilcox*, for *Hale's Pleas of the Crown*.

19th May, 1740. *Read v. Hodges*, for the *History of Peter the Great*.

6th November, 1757. *Tonson v. Mitchell*, for *Byng's Expedition to Sicily*.

III. Injunctions for Printing unpublished M.S.S. without Licence from the Author.

24th May, 1732. *Webb v. Rose*, for *Webb's Conveyancer*.

5th June, 1741. *Pope v. Curl*, for printing *Pope's Letters*.

13th June, 1741. *Forrester v. Waller*, for *Forrester's Reports*.

————— *Duke of Queensberry v. Shebbeare*, for *Lord Clarendon's Life*.

Trinity Term, 1768. *Macklin v. Richardson*, for printing *Love a-la-mode*.

IV. Injunctions as to Old Books, after the 21 Years granted by the 8th Ann.

9th June 1735. *Eyre v. Walker*, for the *Whole Duty of Man*. This could not be the *Old Duty of Man*; if it was, the right must have been founded upon an assignment from the author, but the author is unknown to this hour.

V. Injunctions relative to Books, after the 28 Years given by 8th Ann.

Trinity Term 1765, *Millar v. Donaldson*, for *Thompson's Seasons*, *Pope's Iliad*, *Swift's Works*, with the *Life and Notes* by *Dr. Hawkesworth*.—As to *Swift's Works*, the *Life and Notes* being within the statute, the injunction was continued; but as to *Thompson's Seasons*, and *Pope's Iliad*, being beyond the 28 years,

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the injunction was dissolved. And from all these cases it appears, that the *general question* touching the *common law right*, has never been determined by any *Chancellor*.

Mechanical instruments, and also prints made by engravers, have ever been open to all artists, unless secured to the *inventor* by *patent*, or *act of parliament*. Between such inventions and copies of books, no sensible distinction can be made. An orrery represents the planetary system. He who makes one after the first model, takes the science of astronomy as represented by the orrery: And he who prints a book, takes the author's sentiments.—Where is the difference? *Prerogative* copies, such as the *Bible*, and books of *Divine Service*, do not apply to the present case; they are left to the superintendence of the Crown, as the head and sovereign of the state, upon principles of *public utility*. But to prescribe to the Crown a perpetual right to the Bible, upon principles of *property*, is to make the King turn bookseller: And if it be true, that the King paid for the translation of the Bible, it was a purchase made for the whole body of the people, for the use of the kingdom.—Acts of Parliament, it is admitted, are the work of the Legislature, and therefore under the direction of the Crown, as the executive part of the constitution. *Property* therefore is not the foundation of *prerogative* copies. King *Charles I.* published a translation of *David's Psalms*, written, as his Majesty says in the preface, by his Royal Father; but the idea of a perpetual property was not then conceived, and therefore a *patent* was granted, to give the *sole right* to the bookseller.

But it is said, that the authority of such a man as *Milton*, is of great weight; and he is represented as speaking, after much consideration, on the very point. His words are, *the just retaining of each man's copy, which God forbid should be gainsaid*. *Milton's Prose Works*, 4to. vol. 1. p. 172.—*Milton*, in the close of his famous speech, “for the liberty of unlicensed printing,” in 1644, says, the ordinance of the two houses, for subjecting the press to a *licencer*, was obtained by indirect means. *It may*, says he, *be doubted, whether there was not in it the fraud of some old patentees and monopolizers in the trade of bookselling, who, under pretence of the poor in their Company not being to be defrauded, and the just retaining of each man's copy (which God forbid should*

be gainsaid) brought divers glossing colours to the House, &c. Milton's idea of each man's copy, arises from the old patentees and monopolizers; and certainly, while there was a relative property in the Stationer's Company, the poorer members ought not to be defrauded. But he does not say how long the copy should be retained; and that is the very point in this cause. It may be presumed, that Milton could not wish that *Paradise Lost*, which was sold for 5 l. and two further sums of 5 l. to be paid conditionally, should continue a splendid fortune in the hands of a bookseller, and his own granddaughter be obliged to beg a charity play, at Drury Lane Theatre, 1752. Dr. Swift and Mr. Pultney were both clearly of opinion, that there was no common law right; vide Swift's Letters, vol. 3. And the opinion of such a man as Mr. Pultney, who was for years of the first ability in parliament, may be allowed to have some weight. Dr. Watts published a volume of sermons in 1720. Mr. Longman, one of the present respondents, republished it in 1758; and though the period of 28 years was expired, a common law right, if it existed, would have protected the property; but Mr. Longman annexed to his edition, a patent for 14 years, dated the 21st of March, 1758.

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Whatever encouragement may be due to authors, the common law cannot, after the silence of ages, pronounce at once upon a new species of right, which has been hitherto property, not properly known. Bank notes are of a value well ascertained, and yet the common law did not adapt itself to that emergence of commerce; but it was for the Legislature to make the stealing it, or taking it by robbery, a felony. 2 Geo. II. c. 25. The statute of Ann was not declaratory of the common law, but introductive of a new law, to give learned men a property which they had not before.

But it has been contended on the part of the respondents, that the act of Queen Ann is an accumulative statute, declaring the common law, and giving additional penalties. And in support of this, a pamphlet, said to have been given to the members, in 1709, has been cited, and it appears, that the booksellers meant to inculcate the idea of ancient usage; but what that usage was, how it took its origin, or how it was stated in the pamphlet, the extract leaves in obscurity. Contemporary exposition will, no doubt,

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doubt, deserve attention. To this end, the history of the bill, as it stands upon the Journals of the House of Commons, together with the account of the conference with the Lords, will clearly evince, that the Legislature were not employed in *securing* an *antecedent property*, but expressly declared, "That authors and booksellers had the *sole property* of books *vested* in them by *that act*, for the terms therein mentioned." *Vide* the Journals, 12th *December*, 1709, when the booksellers petition was presented; also their second petition, 2d *February*, 1709. — 14th *March*, 1709, Resolved, that the title be, "A bill for the encouragement of *learning*, by *vesting* the *copies* in the authors or purchasers, &c." — 5th *April*, the bill returned from the Lords. 5th *April*, 1710, a conference with the Lords, and Mr. *Addison*, one of the Commons.

Of this evidence the respondents feel the weight, and therefore they resort to a *variety of comments* upon the statute itself. They rely much upon the preamble, which says, "Whereas printers, booksellers and other persons, have of late frequently taken the liberty of printing, &c. books and other writings, without the consent of the authors or proprietors of such books, to their very great detriment, and too often to the ruin of them and their families; for preventing therefore such practices for the future," &c. From the words *taking the liberty*, and *such practices*, it is inferred, that the persons within the description of them were *wrong doers*. A question is put, When the Legislature speak of a liberty taken, could they mean a *claim founded on any right*? And by *practices*, did they mean to describe the exercise of a *legal right*? The word *practices*, is properly applied to the doing of *illegal acts*. If they were *wrong doers*, the Legislature has used the mildest terms in the compass of our language; but surely they were not *trespassers*. After the final extinction of the licensing act, in 1694, men had a right to reprint books, in the same manner as *printers* had lawful authority to copy, engrave and publish all *works, designs, and prints*, which were not secured to the *inventors* by *patent* for a term of years; and yet the Legislature, 8 *Geo. II. c. 13.* in the very same words, recites in the preamble, "Whereas divers *printers*, &c. have of late *taken the liberty* of copying, engraving; and for preventing therefore *such practices*," &c. Again, in 7 *Geo. III. c. 38.* the *printers* who engraved and exposed to sale

sale the designs and prints of the late *William Hogarth*, after the period of 14 years granted to him by parliament, are in that act called the *proprietors* of the copies of *William Hogarth's* works; and then the Legislature proceeds to *restrain* those very proprietors from vending the copies which were their *legal property*. Thus it is plain, that the Legislature speaking of a *legal right*, described it by the words, *taking the liberty*, and *such practices*. If by the terms *taking the liberty*, and *such practices*, it can by fair construction be intended, that *injustice*, *fraud* and *rapine* are implied, the like imputation is thrown upon the printsellers, who exercised a *legal right*, and are allowed to be *proprietors*. It may be presumed, that if the Legislature had seen *actual guilt*, or *illegal practices*, they would, agreeably to their own dignity, have kept no terms with men, who *violated laws*, and *wrought the ruin of families*. But learning, to the honour of the Legislature, was to be encouraged; and it may be asked, if the statute of Queen *Ann* did not *create a new property*, what was done for learning? If the right was *antecedent* to the act, how did the Legislature *vest* the property in authors? If they had the faintest idea of a *pre-existing property*, why was the *sole right* of re-printing books, which had been *previously* published, restrained to 21 years, and *no more*? A strange way of encouraging learning, by abridging *ancient rights*! If the act of Queen *Ann* intended merely to give *additional penalties*, by way of new fences to a *common law right*, why give those penalties for 14 years only? If the property is *perpetual*, why should not the remedy be *co-extensive*? If by *copy* be understood a *perpetual property*, the author who sold his copy under the idea of a transfer for 14 years only, may be told by an artful bookseller, that *more was meant than meets the ear*, and that a *sale of his copy*, imports a *sale for ever*. The consequence will be, that instead of encouraging learning, a snare has been unwittingly spread for men of genius and industry; and the clause of the statute, which gives a reversion to the author at the end of 14 years, *if he live so long*, will be eluded by the craft, and, as *Milton* phrases it, by the *sophisms of merchandize*. If the book at the end of 14 years reverts to the author, his interest is served: If it does not, the Legislature, by such a construction, has extended *no benefit to learned men*. But it happily appears, that Parliament has revised its own acts, and, in terms as clear as the *English* language affords, declared, that the *property was given* by the act of Queen *Ann*. For

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7 Geo. II. c. 24. is intitled, "An act for granting to *Samuel Buckley*, the *sole liberty* of printing and reprinting the Histories of *Thuanus*. The preamble recites, that *Buckley*, at a very great expence, had prepared an edition of *Thuanus* in seven volumes folio, and then adds, "Whereas the sole liberty of printing and reprinting books, for the term of 14 years, to commence from the day of publishing the same, granted to the proprietors thereof, was granted to the proprietors thereof, by an act 8 *Ann*, intitled, "an act for the encouraging of learning, by *vesting the copies* of printed books, in the authors or purchasers," &c. Of the sense and meaning of the Legislature, we are now fully informed by the *highest authority*: He *that runs may read* the intent and scope of the statute, namely, the *sole liberty* of printing and reprinting, was granted for the term of 14 years. The law was made for the *encouragement* of learning: *Ingenuity* has endeavoured to *puzzle* it, but the *Legislature* has given the exposition.

The notion of a *perpetual privilege and monopoly*, was within these few years hatched among the booksellers, who now come with glossing colours, and under a pretence of serving the cause of literature, mean only to get the fruits of genius into their own hands for ever. But the consequences of this new doctrine, were it established, would be fatal to the *interest of letters*, and the *fame* of every valuable author. Books may be held up at too high a price. Notes and illustrations may be wanted, and in 30 or 40 years generally are; for not only the *manners*, but even *science* changes in the progress of time. Moral Philosophy and Mathematics, should keep pace with the vicissitudes of the world. Useful commentaries upon valuable works, cannot be made without the licence of the bookseller, who has purchased the copy: His avarice, his timidity, his want of sense, may tell even the *original author*, that he shall not reprint *his own book*, with further improvements. If the author should happily be permitted to do it, it must be upon the bookseller's terms; but more probably, the frugality of the bookseller will grudge an additional expence, and taking upon him to *pronounce upon wit*, he may say, that he likes the book as it is. *Milton*, in his famous speech, has thought this head of argument an important topic against a licenser of the press. His words are, "What if the author shall be one so copious of fancy, as to have many things
" well

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“ well worth the adding, come into his mind after licensing,
 “ while the book is yet under the press, which not seldom hap-
 “ pens to the best and diligentest writers, and that perhaps a
 “ dozen times in one book. The printer dares not go beyond
 “ his licensed copy; so often then must the author trudge to his
 “ *leave giver*, that those his new insertions may be viewed; and
 “ many a jaunt will be made, ere that licenser (for it must be
 “ the same man) can either be found, or found at leisure.
 “ Mean while either the press must stand still, which is no small
 “ damage, or the author lose his accurate thoughts, and send
 “ the book forth into the world, worse than he could make it,
 “ which to a diligent writer is the greatest melancholly and vex-
 “ ation that can befall.” In the case of a perpetual privilege
 and monopoly, the bookseller becomes the author’s *leave giver*; many a jaunt may be made that his new insertions may be viewed, and at length he may sit down with the melancholy and vexation of leaving his book worse than he could make it. But should the work, pursuant to the statute of Queen Ann, revert to the author in 14 years, he will become the guardian of his own fame; and in consequence, *learned and industrious men will be enabled to reap not only the fame, but the profits of their labours, to the honour and advantage of themselves and their families.*

It has however, been colourably said, that for a *perpetual property*, authors may rise in their demand, and gain a much larger sum for the copy; or they may publish on their own account, and feel the pulse of the public before they dispose of the copy. Except in one or two modern instances, a competent price has never been given. If booksellers have hitherto been dealing under the idea of a *perpetual monopoly*, they have not paid an adequate compensation for it, and the same phlegm will govern their future transactions. It is a melancholy consideration, that even a writer of Mr. Thompson’s merit, does not appear to have received 100 l. for the poems called the *Seasons*. The whole sum paid to him for a variety of articles, was 242 l. 13 s. The tragedy of *Sophonisba*, at the old price of a play, was worth 105 l. The poem sacred to the memory of Sir Isaac Newton, *Britannia*, and an Essay on Descriptive Poetry, were worth a considerable sum. How much then remains for the *Seasons*? No work of late years has been more generally received. The profits to Millar must therefore

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therefore have been large; and after all, the copy sold for 505*l.* at a public auction. If authors had always access to a *Clarendon* press, where the precise number ordered would be printed, and *no more*, the impression might be distributed to the *London* booksellers, and an author might stand the hazard. But authors are not often in that situation, and besides, the immediate expence of paper and print is not favourable to such experiments. A period of 14 years is a sure test of every book. If after that time, it be worth reprinting, the author's most accurate thoughts may be interwoven, and the fame and profit will accrue to the man of labour and invention. But if a perpetual privilege and monopoly are to interrupt his hopes, the purchasers of the copy will be enriched, and, in the emphatic words of Dryden, *It will continue to be the ingratitude of mankind, that they who teach wisdom by the surest means, shall generally live poor and unregarded; as if they were born only for the public, and had no interest in their own well-being, but were to be lighted up like tapers, and waste themselves for the benefit of others.*

A. Wedderburn.
J. Dunning.
F. Hargrave.

On behalf of the respondents it was contended, that the claim of authors to the sole and exclusive right of printing and publishing their own works, is founded upon principles of reason and natural justice. It is just and equitable, that those who labour in the advancement of knowledge, and communicate their ideas in written compositions to the public, should have a recompence; and in order to obtain a suitable one, authors, when they publish their works, mean to reserve to themselves the right of multiplying printed copies; and the nature of printing, and the circumstances attending publication being considered, there is an *implied agreement*, on the sale of each particular copy, that the purchaser shall not invade the beneficial right of multiplying copies, intended to be reserved by the author. From the first introduction of the art of printing into *England*, this peculiar species of property has been known by the expressive name of *Copy right*; has continually been the subject of *sale*, *gift*, and *family settlement*; has always been protected from invasion; and in some instances, has even been *recognized by the Legislature*. It is a point too well established to be denied, that at *common law*, the sole and exclusive right of multiplying for sale, the copies of acts of parliament, proclamations, and other papers of a *public* nature, belongs to the King and his patentees; not in consequence

consequence of any prerogative over the art of printing, but on account of his peculiar interest, as the *executive power*, in all publications and acts of state, flowing from himself or Parliament. This shews, that an *interest* or *property*, similar to that claimed by authors, *may* subsist at *common law*; and though the reasons on which authors claim an *interest* in their own *private* copies, are not precisely the same as those from which the *interest* of the Crown in *public* copies is derived, yet they are not less forcible; but give to authors a title of property as well founded in *justice*, as the title of the Crown is founded in *policy*, and one equally consistent with public utility.

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There is nothing in the statute of Queen Ann to take away that interest or property, to which authors were before entitled, in the publication and sale of their own works. The object of that statute was to secure literary property, by penalties, from piracy and invasion; and though the protection given is only *temporary*, yet so far from being made so under an idea of the Legislature, that authors had no property in their works before, or with an intention to limit its duration, the statute expressly declares, that nothing contained in it shall *prejudice* or confirm any right which the universities, or *any person or persons*, might claim to the printing or reprinting of any book or copy *then* printed, or *afterwards* to be printed. Since this statute, many injunctions have been granted by the Court of Chancery, to restrain the invasion of *copy right*, notwithstanding the expiration of the term, during which *only* the statute gives a protection by penalties; and the opinion of the Chancellors who granted those injunctions, has been confirmed by a judgment of the Court of King's Bench *, in favour of literary property, which was given after solemn argument. Upon the faith of the protection which has hitherto been given to literary property, independently of the statute of Queen Ann, great sums of money have been expended in purchasing copies, and in the printing and manufacturing books from such copies; vast stocks of which books, from the unalterable nature of printing, are unavoidably in hand; and if such protection should be now withdrawn, many families would lose their whole estates, and necessarily be involved in ruin.

* 4 Burr.
2303.

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 DECREE
 reversed.
 M. S. Jour.
sub anno 1774,
 p. 130.

After hearing Counsel on this appeal, the following questions were put to the judges; *viz.* “ I. Whether, at Common Law, “ an author of any book, or literary composition, had the sole “ right of first printing and publishing the same for sale, and “ might bring an action against any person who printed, pub- “ lished and sold the same without his consent? II. If the au- “ thor had such right originally, did the law take it away upon “ his printing and publishing such book, or literary composi- “ tion; and might any person afterwards reprint and sell, for his “ own benefit, such book, or literary composition, against the “ will of the author? III. If such action would have lain at “ common law, is it taken away by the statute 8th *Ann*; and is “ an author, by the said statute, precluded from every remedy “ except on the foundation of the said statute, and on the terms “ and conditions prescribed thereby? IV. Whether the author “ of any literary composition, and his assigns, had the sole right “ of printing and publishing the same in perpetuity, by the com- “ mon law? V. Whether this right is any way impeached, “ restrained, or taken away, by the statute 8th *Ann*?” The Judges differing among themselves, delivered their opinions *se- riatim*; when five of them, namely, Mr. Justice *Ashurst*, Mr. Justice *Blackstone*, Mr. Justice *Willes*, Mr. Justice *Aston*, and the Lord Chief Baron of the Court of Exchequer, were of opinion *in favour* of the perpetuity, or common law right; and the other six, namely, Mr. Baron *Eyre*, Mr. Justice *Nares*, Mr. Baron *Perrott*, Mr. Justice *Gould*, Mr. Baron *Adams*, and the Lord Chief Justice of the Court of Common Pleas, were of opinion *against it*: Whereupon it was ORDERED and ADJUDG- ED, that the decree complained of should be reversed; and that the respondents bill should be dismissed, without costs*.

* The universities were so much alarmed by this determination, that in the year 1775, they applied for and obtained an act of Parliament, for securing to them and the colleges of *Eton*, *Westminster* and *Winchester*, the perpetuity in all copies then, or at any time afterwards given to, or acquired by them. *Vide stat.* 15 *Geo.* III. c. 53.

John Commons, lessee of John Lord Viscount Netterville, and Sir Charles Burton, Bart.	} Plaintiffs	} in Error. Case II.
John Marshall, Esq; -	Defendant }	

24th February, 1774.

NICHOLAS, Lord Viscount *Netterville*, father of the present Lord, being seised in fee of the manor and lands of *Dowth*, *Newtown*, otherwise *Ballyboy*, part of *Proudfoot* town, (of which the lands in question were part) situate in the county of *Meath*, and of the lands of *Ballymore* and several other lands in the county of *Westmeath*, and of several lands in the county of *Dublin*, by articles dated the 16th of *March* 1731, made previous to his marriage with *Catherine Burton*, in consideration of 9000 *l.* her marriage portion, covenanted to convey and settle the said lands of *Ballymore*, and several other lands in the county of *Westmeath*, the mansion house and demesne of *Dowth*, then in his lordship's actual possession, containing 319 acres, that part of *Proudfoot* town then held by *Anthony Walsh*, the town and lands of *Ballyboy*, then in the possession of *Con. O'Neil*, and others, and several other lands in the counties of *Meath* and *Dublin*, to the use of himself for life *sans waste*, and with full power to commit waste (except by cutting down ornamental trees), and also with full power of making leases of all or any part of the said premises, for any term not exceeding 31 years, or three lives, to commence in possession at the best improved rent that could be had for the same; remainder to trustees to support contingent remainders; and (subject to a jointure of 600 *l.* a year to *Catherine* for life) remainder to the first and other sons of the marriage in tail male; remainder to his own right heirs. These articles were duly registered in the public register's office in *Dublin*.

Lord *Netterville*, by lease, dated the 30th of *March* 1734, in consideration of a fine of 100 *l.* demised to *Anthony Walsh*, the lands of *Proudfoot* town, and several other parcels of his estate, not included in the above settlement, therein described as part of the

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the lordship of *Dowth*, containing 99 acres and 2 roods; to hold to *Walsh*, for 31 years from the 1st of *May* then next, at the yearly rent of 43 *l.* 5 *s.* And by another lease, dated the 14th of *July* 1735, in consideration of another fine of 100 *l.* his Lordship demised to the said *Anthony Walsh*, several other parts of the lordship of *Dowth*, which were part of the settled estate, containing 102 acres and 4 roods, for 31 years, from the 1st of *May* then last, at the yearly rent of 10 *s.* by the acre. And by a third lease, dated the 15th of *September* 1735, his Lordship again demised to *Walsh*, all the lands comprised in the first lease, and also 3 acres of bog, for 31 years from the 1st of *May* then last, at the yearly rent of 53 *l.* 5 *s.* being 10 *l.* more than the rent reserved by the first lease.

Under these leases, *Anthony Walsh* held the lands thereby respectively demised, till his death, which happened in 1736, or 1737; having by his will appointed *Sarah Walsh* his widow, his brother Colonel *George Walsh*, and *William Marshal*, executors. But *Sarah* alone proved the will, and enjoyed the lands.

Lord *Netterville* was before his marriage indebted to the amount of 5000 *l.* which was agreed by the articles to be paid out of the lady's fortune, but not being able to procure present payment of the fortune, he ran farther into debt, to the amount of 11,000 *l.* in the whole; and therefore to raise money for payment of his debts, his Lordship, in 1739, obtained an act of parliament in *Ireland*, whereby (after reciting the marriage articles, and the amount of the lady's portion) the lordship and lands of *Ballymore*, and several others in the county of *Westmeath*, were vested in *Robert Burton*, *Peter Daly*, *James Hufsey* and *Charles Burton*, Esqs; (now Sir *Charles Burton*, Bart. one of the lessors of the plaintiff, as being the surviving trustee) and the survivor and their heirs, in trust, to sell so much thereof as would pay the 11,000 *l.* the amount of his Lordship's debts: And in lieu thereof, his Lordship's unsettled lands in the county of *Meath*, and 5000 *l.* part of Lady *Netterville*'s fortune, were vested in the trustees, to the same uses as the lands then to be sold were by the marriage articles to have been settled; and by the act, all that part of the manor, town and lands of *Dowth*, then in the possession of *John Farrall*, and of the executors of *Anthony Walsh*, the town and lands of *Newtown*, the town and lands of *Ballyboy*,

Ballyboy, and part of *Dowth* in the possession of *Patrick Evers*, together with all that part thereof in the possession of *James Kelly*, with the mills, weirs and fishery thereof, and that part of the town and lands of *Dowth* in the possession of *Nicholas Hilcock*, all situate in the Barony of *Slane* and county of *Meath*, and several other lands in the counties of *Meath* and *Dublin*, were vested in the trustees and their heirs, to the uses in the marriage articles, and became thereby compleatly settled.

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Several years afterwards, *Sarah Walsh*, knowing Lord *Netterville's* necessities, applied to him for a new lease of all the lands comprised in the former leases, offering him a fine for such a new lease; and after the treaty had gone on for some time, she agreed to give a fine of 52*l.* and some wethers, which his Lordship agreed to accept, and she accordingly paid the fine, and gave the wethers; and the former leases being surrendered, his lordship executed to her a lease, dated the 4th of *August*, 1750, set forth in the special verdict hereafter stated, in which no fine was mentioned; but the *habendum* was, “ To her heirs, executors, administrators and assigns, from the 1st Day of *May* last, for and during the natural life and lives of *Ralph Walsh*, youngest son of the said *Anthony Walsh* and *Sarah Walsh*, *Jane Walsh*, youngest daughter of the said *Anthony* and *Sarah Walsh*, and *Alice Marshall*, eldest Daughter of *John Marshall*, of *Roch Marshall*, in the County of *Lowth*, Gent. and the longest liver of them, or for the term, time and space of 31 years, to commence from the 1st day of *May* last, which shall last longest, from thenceforth next ensuing fully to be compleat and ended.”

On the 10th of *March* 1750, *Nicholas* Lord *Netterville* died, leaving issue, by *Catherine* his Lady, the present *John* Lord Viscount *Netterville* (one of the lessors of the plaintiff) his only son, then an infant of about five years old, to whom his uncle *Benjamin Burton* was appointed guardian.

In *May* 1760, *Sarah Walsh* the lessee died, being survived by all the three nominees, or *cestui que vies* in the lease.

On the 8th of *June* 1766, the present Lord Viscount *Netterville* attained his age of 21.

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The lands comprised in the several different leases to *Anthony Walsh*, were let at a great under value, and the rent reserved by the latter lease made to *Sarah Walsh*, was even 4*l.* 2*s.* 9*d.* yearly less than the rents reserved by the former leases. But the principal objection taken to this latter lease, and that on which alone the question arose was, that it did not pursue the particular power in the articles, which restrained and limited the duration of the term to be leased, to the period of three lives, or a term of 31 years, in the alternative, at the option of the lessor; whereas the term granted to *Sarah Walsh* was for three lives, or 31 years, in the disjunctive, neither certain for the one or the other, but which should last longest.

Upon this ground, Lord *Netterville*, as a purchaser under the articles and act of parliament, in *Hilary* Term 1767, brought an ejectment in the Court of Exchequer in *Ireland*, upon the double demise of himself, as tenant in tail under the articles, and of Sir *Charles Burton*, as the surviving trustee in the act of parliament, to avoid the lease and recover the lands therein; to which defence being made by *John Marshall* Esq; the husband of a daughter of *Sarah Walsh*, and whose eldest daughter *Alice* was one of the lives named in the lease, and the general issue having been pleaded, the cause came on to trial on the 23d of *March* 1767, at the assizes held at *Trim*, for the county of *Meath*, when the following special verdict was found, viz.

“ That *Nicholas*, late Lord Viscount *Netterville*, on and before
 “ the 4th day of *August* in the year of our Lord 1750, was duly
 “ and legally seised for his life of all the said lands and premises in
 “ the plaintiff’s said declaration mentioned, and had also, on
 “ and before the said 4th day of *August* in the year of our Lord
 “ 1750, duly and legally a power of making leases of all or any
 “ part of the said lands and premises, for any term or time not
 “ exceeding 31 years, or three lives, to commence in possession,
 “ and at the best improved rent, that could be had for the same.
 “ That the said *John* Lord Viscount *Netterville*, who is one
 “ of the lessors of the plaintiff in this cause, on and before the
 “ said 4th day of *August* in the said year 1750, had a remainder
 “ in tail in all the said lands and premises in the plaintiff’s said
 “ declaration mentioned, duly and legally limited to him and the
 “ heirs male of his body, to commence immediately after the
 “ death

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“ death of the said *Nicholas*, late Lord Viscount *Netterville*, who
 “ was his father. That the said estates and power were duly and
 “ legally created by a certain deed, which the said *Nicholas*, late
 “ Lord Viscount *Netterville* executed on the 16th day of *March* in
 “ the year of our Lord 1731, and by a certain act of parliament
 “ which was made in this kingdom, in the 13th year of the reign
 “ of his late Majesty King *George II.* That the said *Nicholas*,
 “ Lord Viscount *Netterville* being seised of the said lands and
 “ premises for his life as aforesaid, with such power to make
 “ leases thereof as aforesaid, on the said 4th day of *August* in the
 “ year of our Lord 1750, executed a certain indenture, by which
 “ he demised, or took upon him to demise the said lands and
 “ premises to *Sarah Walsh* late of *Ardath*, in the county of
 “ *Lowth*, widow, for the lives of *Ralph Walsh*, *Jane Walsh* and
 “ *Alice Marshall*, and the longest liver of them, or for 31 years
 “ from the 1st of *May* then last past, which should last longest, at
 “ the annual rent of 104 *l.* and the quit-rent in proportion to the
 “ number of acres, payable half yearly; by virtue of which said
 “ indenture, the said *Sarah Walsh* entered into and became seised
 “ or possessed of the same premises as the law requires, and conti-
 “ nued so seised or possessed as the law requires, until the 1st day
 “ of *May* 1760, on which day she died. That the said *Ralph*
 “ *Walsh*, *Jane Walsh* and *Alice Marshall*, the lives named in the
 “ said indenture, are all now in being; that the said *Nicholas*
 “ Lord Viscount *Netterville*, on the 20th of *March* in the year
 “ 1750, died seised of the said lands and premises as the law
 “ requires, and that immediately on his death the said *John*
 “ Lord Viscount *Netterville*, (one of the lessors of the plaintiff)
 “ by virtue of his said remainder of and in the said lands and
 “ premises, became seised of the said lands and premises to him,
 “ and to the heirs male of his body, as the law requires, and
 “ continued so seised of the said lands and premises as the law
 “ requires, until the 19th day of *November* 1766. And being so
 “ seised of the said lands and premises as the law requires,
 “ granted and demised the said lands and premises, on the said
 “ 19th of *November* 1766, unto the said plaintiff *John Commons*,
 “ for the term and space of 21 years, commencing from the said
 “ 19th of *November* in the said year 1766, and from thence fully
 “ to be compleat and ended. By virtue of which said demise, the
 “ said *John Commons*, on the 20th of *November* in the said year
 “ of our Lord 1766, entered into and became possessed of the
 “ said

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“ said lands and premises as the law requires, and continued so
 “ possessed until the 21st day of *November* in the year of our
 “ Lord 1766, on which day the defendant, *John Marshall*, expelled the plaintiff out of the said lands and premises, as the plaintiff has set forth in his said declaration. And if upon the whole matter, &c.”

The plaintiff being advised that the lease was void, and could not be supported by the power, declined any advantage from the under value of the land, which occasioned the silence in the special verdict as to this point: And there was no evidence of any fine or advance paid by the defendant, to render it otherwise than a lease at rack rent.

This special verdict having been returned into the Court of Exchequer, was several times argued before the Barons of that Court; who, after long consideration (the Court then consisting of the Lord Chief Baron *Foster*, Mr. Baron *Scott* and Mr. Baron *Smythe*) on the 13th of *February* 1769, gave judgment for the defendant. From which judgment, the plaintiff, on the 2d of *May* following, brought a writ of error into the Exchequer Chamber in *Ireland*, where the cause was several times argued before the Lord Chancellor of *Ireland*, assisted by Lord *Annaly*, Lord Chief Justice of the King's Bench, the constituent members of that Court; when, after long deliberation, Lord *Annaly* fully delivered his opinion for reversing the judgment, but the Lord Chancellor being of a different opinion, affirmed it; and so judgment was again entered up for the defendant.

A. Wedderburn.

A. Forrester.

To reverse this judgment, Lord *Netterville* brought a writ of error in parliament, and on his behalf it was argued, that the late Lord *Netterville's* power of leasing, given him by his marriage articles in 1731, and by the act 13 *George II.* was in the disjunctive, that he might lease for any term not exceeding 31 years or three lives, *to commence in possession*: So that his, and his lessee's option, *at the time of making the lease*, must decide which of the two periods should determine it. Powers of this and a similar kind, were said below to be favourably construed part of the ancient dominion: So indeed they are, but with this restriction, that what was manifestly intended to be done in *execution of the power*, shall be good, notwithstanding any informality or defect in

in such act; but an act done *beyond* the power must be void. The lease in question was made under the power, for three lives, or for the term of 31 years, to commence from the 1st of *May*, which should last longest; so that instead of leasing expressly for one or other of the terms given by the power, Lord *Netterville* leased for one or other, as chance should direct, in manifest opposition to his power. Nor could this excess be made good by construing, as was done below, the word *or* into *and*, and so making it to be a certain lease for lives, with a remainder of 31 years; for the words *which shall last longest*, shew that both were not intended to pass, but one only; and which it should be, was to depend upon the event mentioned, and could not therefore *commence in possession*, at the making of the lease, as expressly required by the power. Nor was it at all similar to a lease made for 40 years, the lessor having power to lease but for 20, where the excess only shall be rejected, and the lease be good for 20 years; for there was an estate certain in its nature originally created, *viz.* a chattel interest; but here was neither freehold or chattel, till determined by a future event. No part of a deed must be rejected, which has a sensible meaning, or tends to denote the intent of the parties. The words therefore in this lease, *which shall last longest*, must not be rejected, as endeavoured by the defendant, because they manifestly proved the intent of the parties to give and take no absolutely certain interest, but an indefinite one, whose nature depends on a future event. Now this kind of interest is unknown to the common law, and productive of many inconveniencies. To this moment the uncertainty existed. For upon the death of *Sarah Walsh* the lessee, how was the plaintiff to avow for his rent? As on a lease for lives, or a lease for years? And was the lessee's interest upon her death, if intestate, to go to her heir as a descendible freehold, or to her administrator, or next of kin, as a chattel? Such a species of property the law will not endure.

But further: The plaintiff the remainder-man, and who was a purchaser for the most valuable of considerations, had a clear right to exact a strict performance of the condition annexed to his father's power of leasing. Here the power was to lease for three lives, or 31 years, so that the remainder-man was to have his land either at the determination of the lives, or ef-

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fluxion of the years, according as the lease was made for the one or the other. But as the present lease was framed, he must wait the end of both, and consequently was deprived of the benefit intended him by the power. This was an excess of power to his manifest prejudice, and to the advantage of the lessee, who at the determination of one of the terms, had a right to continue his lease to the determination of the other; and so stave off the remainder-man's recovering his land. But this was most certainly never intended, and proved an excess in the exercise of the power, which courts of justice, who carefully look to the strict observance of every condition in the remainder-man's favour, will not countenance. Besides, the verdict did not give the remotest hint of *Sarah Walsh's* ignorance of the nature of Lord *Netterville's* power; the articles which gave it him were duly registered, and afterwards incorporated into and executed by the act of parliament, which was full notice of their import to the whole kingdom. The lessee therefore took the lease at her peril, whether within, or exceeding her lessor's power.

E. Thurlow.
J. Dunning.

On the other side it was said, that powers reserved in family settlements, being considered as reservations of so much of the absolute dominion, the execution of them, like that of conveyances from men seised in fee simple, is to be construed most strongly against the grantor, and most beneficially for the grantee; and especially, where the grantee is a purchaser for a valuable consideration, which was the case of the present lessee. Of all powers, that of leasing is the most favoured, for obvious reasons of public policy. It would be a great discouragement to agriculture, if men, who have laid out their substance on the faith of their leases, in the cultivation of their farms, were to be deprived of those leases, on nice and critical objections to the form of them. The hardship would be greater, where the objections are drawn from the terms of a power, of which the tenant is very unlikely to have any knowledge, it being notorious, that in the case of families of any consideration in this country, their tenants take, without enquiry, such leases as their landlords propose to grant, confiding that they have the power they assume. If the objection in the present case should prevail, it was thought a material argument at the bar in *Ireland*, and much relied upon by the Bench in both Courts, in favour of the defendant, that the precedent would destroy great part of the leasehold property in that kingdom, particularly

larly in the *Northern* parts of it. In cases like this, it was apprehended, that all that the remainder-man could reasonably expect, was that the estate, when it came to him, should not be charged beyond what was the intention of the settlor, to allow those who stood before him in the settlement to charge it. Nor would it be so by the lease in question; if it was construed, as it had been by the unanimous opinion of the Court of Exchequer in the first instance, and of the Court of Exchequer-Chamber in the second, as being a good lease for three lives, and no longer. As to the objection, that the lease in question being for three lives *or* 31 years, was void for uncertainty, it was said, that *or* has in many cases been construed *and*, and will always be so, where the intention requires it. But it was not contended, that the power, though it would authorize *either*, would warrant *both*; it was however submitted, that Courts of Law having, in modern times, adopted the same rules of construction as obtain in Courts of Equity, in the construction of powers, and of the instruments by which they are executed, will, where they have been exceeded, correct the excess, and support the execution, so far as it is warranted by the power. The lease in question, so far as it was a lease for three lives, was clearly warranted by the power; and this was apparently the primary object of the parties. Besides this, they had a second object in view, which was to secure the estate to the lessee for 31 years, in case the lease for lives should determine sooner: But this, whether it was considered as concurrent, or contingent, was not warranted by the power. It was possibly intended, though inaccurately expressed, to operate as a covenant or engagement on the part of the lessor, that the tenant, though his lives should drop, should hold the premises for 31 years, at the rent and under the covenants expressed in the lease. The transaction being fair, it was hoped would be supported as far as it could be, without prejudice to the remainder-man; but his interest would not be prejudiced by a lease for three lives, and justice to the tenant required it, since *that* and *more* was apparently intended her.

After hearing counsel on this writ of error, the judges present were directed to deliver their opinions upon the following question; *viz.* "Whether the lease stated in the special verdict "to have been granted by *Nicholas*, late Lord *Netterville*, to "*Sarah Walsh*, can be supported as a good execution of the
" power

Judgment
affirmed.
M. S. Jour.
sub anno 1774.
P. 149.

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“ power stated in the special verdict; or whether such lease be “ absolutely void?” And the Judges having given it as their unanimous opinion, that the lease might be supported as a good execution of the power; it was thereupon ORDERED and ADJUDGED, that the judgment should be affirmed, and the record remitted.

Case 12. *John Blewett*, Esq; - - - Appellant.
Humphry Millet, Clerk, - - - Respondent.

28th February 1774.

HUMPHRY MILLET, the respondent's father, was in his lifetime a considerable adventurer in mines; and his concerns therein were attended with that variety of success, which is usual in all undertakings of so precarious a nature. Among other shares of mines which Mr. *Millett* was entitled to at the time of his death, were seven thirty-second parts of a certain tin mine in the parish of *Breage*, in the county of *Cornwall*, called the Western Great Work, and one tenth part of an adjoining tin mine, called the Eastern Great Work; both these mines having been granted by the Earl of *Godolphin*, as the lord and owner of the soil, to one *Stephen Pearce* and his co-adventurers, under a reservation of every sixth dish of fine ore, deliverable on the grafs, as the Lords *Dole*, according to the laws and customs of the stannaries.

Mr. *Millett*, sensible of the uncertainty of advantages arising from this species of property, and of the many casualties to which it is liable, appeared very anxious, upon the final disposition of his fortune, to guard as much as possible against them; and as his son, the respondent, for whom the bulk of that fortune was intended, was then an infant, the most probable method which suggested itself to him of effectuating this intention, was to invest his executors with a discretionary power of carrying on or relinquishing his mine adventures, as time, accident, or other circumstances, should render it most for his son's benefit.

Accordingly on the 6th of *April* 1750, Mr. *Millett* made his will, and after giving several legacies, he thereby disposed of the residue of his estate, in the following words: *viz.* “ Lastly
“ all the rest, residue and remainder of my goods and chattels
“ both real and personal, rights, credits and effects whatsoever,
“ I do hereby give, devise and bequeath the same unto my
“ son *Humphry Millett*; and I do hereby make, ordain, con-
“ stitute and appoint my well beloved wife *Grace Millett*, *Ed-*
“ *ward Collins*, *John Millett*, and *George Blewett* (the appel-
“ lant’s father) executrix and executors of my last will and tes-
“ tament, in trust for my said son *Humphry Millett*; and to be
“ guardians and trustees over my said children, until they shall
“ respectively attain the age of 21 years: And I do hereby will
“ and desire, direct, authorize and empower my said executrix
“ and executors from time to time, during the minority of my
“ said son *Humphry Millett*, to carry on and adventure my several
“ and respective parts and shares of adventure, in the several tin
“ and copper mines, in which I shall adventure at the time of
“ my death, for my said son *Humphry Millett*, and in trust for
“ him, or to discontinue the same, or such of them as they
“ in their discretion shall think fit: And moreover, for them my
“ said executrix and executors to retain, deduct and keep, out of
“ my goods and chattels, all their charges and expences in ad-
“ venturing as aforesaid, or otherwise relating to the trust I have
“ hereby reposed in them.”

On the 13th of *June*, 1750, the testator died, without altering or revoking his will; at which time the respondent was an infant of about five years old; and soon afterwards the executrix and executors duly proved the same, and acted in the execution thereof for the respondent’s benefit, by carrying on the testator’s shares in such mines as were deemed profitable and advantageous, and discontinuing his shares in such as were in a contrary situation.

Among the latter sort were the two mines abovementioned, called the Western Great Work and the Eastern Great Work; for both of them having been wrought deep, and the charges of working and drawing the water from the bottoms becoming consequently very great, they, in a short time after the testator’s death, became losing and unprofitable adventures.

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George Blewett the appellant's father was a co-adventurer with the testator, and several other persons in these two mines; he having one eighth share in the Western Great Work, and one tenth share in the Eastern Great Work.

About two years after the testator's death, a meeting of the several persons interested in these two mines was held, in order to consider and determine on what was most proper to be done concerning them; when as well on account of the very unpromising condition thereof, as because the Lord *Godolphin* had by his steward insisted, that the sets of the mines, and the right of working the same, was become forfeited according to the Statutory Laws: It was unanimously agreed, to discontinue working the mines and surrender the sets thereof; and some of the old partners agreed to make an application to the Lord, to consolidate both the mines into one, and to grant a new set thereof, when so consolidated, to such of the old adventurers, and such other persons as should be willing to become partners, upon more beneficial terms than before; and in pursuance of this agreement, the working of the mines was accordingly discontinued, the sets thereof surrendered, and the materials sold for the benefit of the partners. But many of the old partners declined any concern with the new partnership, which was formed and consisted of some of the old partners, and some new persons. The mines were also consolidated, and called by the name of the Great Work.

On the 1st of *May*, 1753, a new set thereof was granted to the said *George Blewett*, for the benefit of himself and the new partners therein, under the reservation of every ninth, instead of every sixth dish of the ore, deliverable on the grass, as the Lord's dole.

It is usual for sets of mines, or tin works in the county of *Cornwall*, to be granted to one of the adventurers only; who, though he is considered as a trustee for himself and his co-adventurers, yet he never makes any assignment of, or executes any declaration of trust, touching the respective shares of such co-adventurers, but only enters their names and shares in a book, called the Mine Book, which is deemed a sufficient evidence of their right and property in the mine.

Accordingly,

Cases in Parliament.

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Accordingly, in the month of *February*, 1754, the names and shares of the several co-adventurers in this consolidated mine, were entered and declared in the Mine Book as follows: viz. *John Rogers*, one fourth; *George Blewett*, one eighth; the executors of *Humphry Millett*, one eighth; *William Tremayne and Son*, one eighth; Captain *James Dewen*, one eighth; *Humphry Cole*, one sixteenth; the executors of *John Millett*, one sixteenth; Captain *John Richards* one sixteenth; Captain *Hugh Rogers*, five ninety-sixths; *Richard Jones*, one thirty-second; Captain *Samuel Lemon*, one forty-eighth; *John Nancarrow*, one forty-eighth; and the said *John Nancarrow* was then appointed manager of the mine.

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At the time of this transaction, Mr. *Blewett*, Mrs. *Millett* and Mr. *Collins* were the only surviving executors of the testator's will. It did not appear that either Mrs. *Millett* or Mr. *Collins* was consulted upon the propriety of subscribing an eighth share in this new mine for the infant's benefit, and therefore it was presumed, that Mr. *Blewett* subscribed this eighth part for the infant's benefit conditionally, if the other two executors should think proper to confirm the act by their approbation; and this presumption was confirmed by Mr. *Blewett's* advancing to Mr. *Nancarrow* several considerable sums on account of this eighth part, to the amount of 253*l.* and upwards, without charging the same or any part thereof, to the account of the testator's estate, until such approbation should be obtained.

Proper measures were soon afterwards taken for improving the mine, by erecting a fire engine, driving adits, sinking shafts, and in other necessary works, at an expence of 7000*l.* and upwards. But it was for a long time a matter of very great doubt, whether the mine would ever turn up a sufficient quantity of tin stuff, to repay such expence, and satisfy the current charges of working it.

The apprehension of loss arising from the state of the mine, occasioned Mr. *Collins* and Mrs. *Millett* to express their uneasiness and dissatisfaction with Mr. *Blewett's* conduct, in engaging any share of it for the infant; they being apprehensive, that the expence of working the mine being very considerable, and the probability of profit very uncertain, it could not be for
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the infant's interest, to continue his concern therein any longer; but they declined being explicit on the occasion, and would not in positive terms, either assent or dissent to the continuance of such concern.

However, as the annual period of settling the accounts of the mine approached, and as Mr. *Blewett* did by no means relish the conduct of his co-executors, or the equivocal situation in which he stood with respect to them; he thought it absolutely necessary for his own safety, that they should come to a precise determination, whether the share which he had subscribed for the benefit of the infant, should be continued or not: For this purpose, Mr. *Blewett* in the beginning of *October*, 1754, wrote the following letter to Mr. *Collins*: "I have again considered of what passed between us, when I last saw you, relative to the carrying on the late Mr. *Humbry Millett's* adventures, and more particularly that of the Great Work; and am still of opinion, it would be for the child's benefit to adventure therein: However, as you was pleased to express yourself of a different opinion, and we are very soon to settle the accounts relating to that mine, I desire yours and Mrs. *Millett's* final resolution in answer, for my government therein." To this letter, Mr. *Collins*, on the 9th of the same month, returned the following answer: "I am so much a stranger to the state of all Mr. *Millett's* adventures, both in mine and at melting house, that it is my final resolution not to engage in any of them as one of his son's trustees, and therefore utterly decline being concerned in that particularly, which you call the Great Work."

This letter from Mr. *Collins* conveying only his own negative, Mr. *Blewett* thought it necessary to obtain Mrs. *Millett's* direct sentiments upon the matter; and accordingly, on the 20th of the said month of *October*, 1754, he sent Mr. *Collins's* letter to her, by Mr. *William Cornish* his clerk, requesting her final resolution on the subject of it: And after reading that letter, and entering into some conversation with Mr. *Cornish*, about the condition of the mine, and the expences likely to be incurred in adventuring the same, Mrs. *Millett* desired *Cornish* to acquaint Mr. *Blewett*, that she would concur in every thing relative to her son's affairs with Mr. *Collins*, and that therefore she could
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by no means consent to the carrying on the one eighth part of the said adventure called the Great Work, on her son's account.

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Mr. *Blewett*, in consequence of these concurring sentiments of his co-executors, thought it incumbent on him to get rid of the said one eighth share, which he had so subscribed, in the best manner he could. And as it is never customary in mine adventurers, to expose any relinquished share to a public or open sale, but to offer it to the other co-adventurers; Mr. *Blewett*, at a public meeting of such co-adventurers held in *December, 1754*, for the purpose of auditing and settling their annual accounts, informed them of what had passed between Mr. *Collins*, Mrs. *Millett* and himself, respecting the share which he had originally subscribed in the name of *Humphry Millett's* executors; and offered the same to such of them as would accept it, and in case of their refusal, proposed to carry on that share for his own benefit. But none of the co-adventurers seeming inclined to increase their respective concerns in the mine, by taking up such relinquished share, nor in any manner objecting to Mr. *Blewett's* taking it up on his own account, his name was accordingly at such meeting, and with the unanimous consent of every person present, entered in the Mine Book for one fourth part of the said adventure, consisting of the one eighth part which he had originally taken up for himself, and the eighth part which had been entered for the infant's benefit, but was afterwards relinquished in the manner above mentioned. And thereupon Mr. *Blewett* was charged therewith, and paid one fourth part of the costs attending the said mine, from the time of the new grant, and which included the beforementioned sum of 253*l.* and upwards, which he had formerly paid on account of the testator's estate, but had never charged the same therewith, because the object of such charge had not been approved of by his other co-executors.

In *December, 1765*, Mr. *Blewett* died intestate; leaving the appellant his only son, who soon afterwards obtained letters of administration to him, and thereby became his personal representative.

On the 1st of *March, 1766*, the respondent attained his age of 21; and soon afterwards thought proper to file his bill in the

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Court of Exchequer, against Mrs. *Millett* his mother, and against the appellant as the personal representative of his late father, charging the whole of his said father's conduct respecting the mine to be fraudulent; and therefore praying, that the appellant might come to an account for the profits which had been received by Mr. *Blewett* in his lifetime, or by the appellant since his death, for or in respect of the said one eighth share of the mine, from the time that such share was changed into the name of Mr. *Blewett* as aforesaid; that the appellant might pay the respondent what should appear due to him upon the balance of such account, with interest; and that the appellant might procure the respondent to be entered in the Mine Book, as an adventurer, for the said one eighth share of the mine, together with all the gains and profits thereof unreceived and unaccounted for.

To this bill the appellant put in an answer: And thereby, after stating the several facts before set forth, he insisted, that the respondent was not entitled to any share or interest in the mine, whereon to ground the relief prayed by his bill; and that the whole of Mr. *Blewett's* conduct, as one of the respondent's trustees, under his late father's will, was in every respect fair and honest, and free from the least imputation of fraud.

The cause being at issue, and several witnesses examined on both sides, came on to be heard before the Barons of the Exchequer, on the 17th of *December*, 1772, when the Court was pleased to declare, That the respondent was entitled to an eighth share of the said mine; and to decree the appellant to account for the profits thereof, received by the said *George Blewett* in his lifetime, and by the appellant since his death; and it was ordered, that the appellant should do all necessary acts in order to vest the interest of such share in the respondent, and that the respondent should pay the defendant *Grace Millett* her costs to be taxed, and should have the same over again, together with his own costs, against the appellant.

A. Wedderburn.
R. Perryn.
J. Madocks.
J. Brown.

The appellant apprehending himself aggrieved by this decree, appealed from it: And on his behalf it was contended, that this case did not fall within the general rule, that no trustee shall

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shall benefit himself out of his trust estate; for here the testator invested his executors with a discretionary power, to carry on or discontinue his mine adventures, as they should see proper. This power, with respect to the share of the mine in question, was actually and deliberately executed by the major part of the surviving executors; and the share being thus relinquished, became free for any person to take it up, who should be inclined to do so. Besides, the ground of that relinquishment plainly shewed, in what light the object of it was then considered, namely, as an unprofitable not a beneficial interest; and that therefore it was for the respondent's advantage to get rid of it. Mr. *Blewett*, in this transaction, must be considered as acting in two different capacities: As a trustee, he recommended the continuance of the share, upon motives the most disinterested and conclusive with respect to himself, because he was thereby determined to continue his own share; and as a trustee, he was controuled by the joint negative of the other two, and the share in question was consequently relinquished and given up. Here then, an end was put to Mr. *Blewett*'s conduct as a trustee, *quoad* this part of the respondent's property; and in every thing that happened afterwards, he acted in his own private and personal capacity. If therefore the general rule could be extended to this case, it must of necessity follow, that if any one of the other proprietors of the mine, or indeed any other person, had taken up this relinquished share, he would have been considered as a trustee thereof for the respondent's benefit; which no one would contend,

It had been, and might again be urged on the part of the respondent, that upon the relinquishment of the share in question, Mr. *Blewett* ought to have sold the same in an open and public manner, and to the best advantage: But to this it was answered, and was in evidence in the cause, that the mine was at that time in debt to the proprietors in upwards of 6000 *l.* and that the prospect of its ever clearing itself of this debt was then very uncertain: The relinquished share was not therefore a marketable commodity, being loaded with a proportionable part of so heavy a debt. And with respect to the manner in which it was transferred, the offering it to the several co-adventurers at a public meeting, and with the most explicit declaration of the occasion of such offer, was actually exposing it to sale in the most

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most open and public manner that could be, and had all the effect which could be expected from any other mode; inasmuch as the purchaser took it *cum onere*, and no claim was ever made by him upon the respondent, or his estate, for any part of the expence which had been previously incurred upon this share. Further: By this decree, the respondent was to pay Mrs. *Millett's* costs, and to recover them over again from the appellant; whereas it did not appear that she was in any shape a necessary party to the suit, having no kind of interest in the matter in question; but, on the contrary, had been examined as a witness for the respondent: His bill therefore, as against her, ought to have been dismissed with costs; and those costs paid by the respondent himself.

J. Skynner.
Ll. Kenyon.

* Keech v.
Sandford.
Select cases in
Chan. 61.
2 Eq. ab. 471.

On behalf of the respondent it was said, that nothing is better established as a general proposition, than that where a trustee for an infant renews a lease, the renewed lease shall enure for the benefit of the infant. This is a doctrine founded on general policy, to prevent frauds; and the known case of *Rumford market**, has established it as a rule of equity. The trustee's situation in respect of the estate, gives him access to the landlord; and it would be dangerous to permit him to make use of that access for his own benefit. In this case the new grant which was obtained, was in the nature of a renewal; it came in the place of the old adventures, which subsisted in the time of *Humphry Millett*. *George Blewett* understood it so, and by the indorsement on the indenture, or the entry in the Mine Book, allotted one eighth to *Millett's* executors; and in consequence thereof, payments were made by the executors, and they were debited in their capacity of executors.

But it is objected, that the executors had power to abandon any of the adventures that should be thought fit to be abandoned; and that in the moment when great expence was likely to be incurred, Mr. *Blewett* was obliged to abandon the one eighth in dispute, as executor, because Mrs. *Millett* and Mr. *Collins* refused to concur in carrying it on. It was conceived, however, that the facts did not warrant the objection. Mr. *Collins's* letter only imported, that he was *a stranger to the matter*, and could not judge what was expedient to be done, and that therefore he could not personally engage in any of the mine adventures. But it

was not from thence to be inferred, that all were to be abandoned; and it was plain, that this was the manner in which Mr. *Blewett* understood Mr. *Collin's* letter; for though Mr. *Collins* had declared he would not engage in any of the mine adventures, yet, with Mr. *Blewett's* approbation, many other adventures were carried on, on account of the executorship. As to what passed between Mr. *Blewett* and his agents and Mrs. *Millet*, it appeared by her evidence, that she left it to his discretion, to carry on or sell the share belonging to the infant; but she did not appear to have an idea that the share was to be wholly abandoned; she only desired that he would act for her infant son, as he meant to act for himself. If the evidence of *Cornish* (examined on the part of the appellant, and to whom *George Blewett* gave one 48th share of the adventure) was attended to, it did not shew that Mrs. *Millett* determined, on a clear and full state of facts, to abandon the adventure: *Cornish* stated, that before Mrs. *Millett* signified her dissent, some conversation passed between him and her about the state of the mine, the prospect it afforded, and the charges likely to be incurred in carrying it on. What the conversation was, or what account the witness (Mr. *Blewett's* messenger and favourite clerk) gave to Mrs. *Millett's* enquiries, was not stated; but if she acted upon that conversation, it might be supposed, that *Cornish* represented the adventure as not worth pursuing; and though *Collins's* letter was produced to her, yet she did not appear to have been at all apprised of the contents of *Blewett's* letter to *Collins*. Besides, Mrs. *Millett* resided 20 miles from the mine; but Mr. *Blewett* in the neighbourhood of it. What the general opinion of the neighbourhood in respect to the mine was, could not be unknown to him, though it probably had not travelled 20 miles; and many witnesses proved, that so early as May 1753, more than a year before the application to Mrs. *Millett*, it was the general opinion, that the mine would turn out advantageous. But none of the witnesses said, that this opinion was carried to Mrs. *Millett*; and it was no unfair intendment to suppose, that Mr. *Cornish's* conversation with her (which he had thought proper to withhold) gave her a very different state of things. And that the mine would probably prove a beneficial adventure at the time when Mrs. *Millett* was applied to, and when it was admitted she enquired after the prospect of things; was proved decisively against Mr. *Blewett* and *Cornish*, by their continuing adventurers in it.

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DECREE
affirmed.
M. S. Jour.
sub anno 1774,
p. 170.

After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 13. *William Jones*, Esq; and *Elizabeth* his } Appellants.
 wife, - - - }

Charles Morgan, Esq; and others, - Respondents.

Et é contra.

2d May 1774.

Fearne's Con.
Rem. p. 329.

JOHAN MORGAN, Esq; was seised in fee simple of considerable freehold and customary estates in the counties of *Monmouth* and *Glamorgan*, and entitled to the equitable estate in fee simple, according to the custom of divers manors within the said county of *Monmouth*, of several customary estates, much the greatest part whereof was of the nature of *borough English*, descendible to the youngest son; and other part thereof was of the nature of *gavelkind*, descendible to all the sons; but the legal estate of all the customary estates was outstanding in trustees; and being so seised, he died in 1719, having first made his will, whereby he devised certain estates in the county of *Glamorgan*, to trustees therein named, upon trust, to permit *Catherine Morgan*, spinster, to receive the rents of his capital messuage and premises called *Ruperra*, for her life; and upon further trust, to permit his youngest son *Thomas Morgan* to receive the rents, issues and profits of the premises therein mentioned (except the term for life before vested in *Catherine Morgan*) till he attained 21, and immediately after his attaining that age, then to permit the testator's eldest son *William*, afterwards Sir *William Morgan* and his heirs, to receive the rents, issues and profits of all the said premises, till such time as his second son, the said *Thomas Morgan*, should convey and assure unto his said son *William* and his heirs, (if thereto required) either by fine or fines, recovery or recoveries, deed or deeds, surrender or surrenders, or by such other ways or means sufficient in the law, all the right, title, interest, claim,

claim, or demand, which he the said *Thomas Morgan*, or his heirs might after the testator's decease, have or claim to all or any customary estate, which he then enjoyed in any lordship within the county of *Monmouth*, and might by virtue of any custom or usage descend to the said *Thomas Morgan* as his youngest son; and immediately after such conveyance and assurance as aforesaid, and not otherwise, he willed that the whole premises before mentioned, should be to the use and behoof of his said second son *Thomas Morgan*, and his heirs and assigns for ever.

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The testator left issue two sons, viz. the said Sir *William Morgan* and *Thomas Morgan*, and two daughters; and upon his death, Sir *William Morgan*, his eldest son, entered upon all the estates which descended to him by the death of his father, or which passed to him by virtue of his will.

By indentures of lease and release, dated the 13th and 14th of May 1723, the release being of six parts, and made between Sir *William Morgan* of the first part; *William*, Duke of *Devonshire*, and Lady *Rachael Cavendish*, one of his daughters, of the second part; *James Cavendish*, Esq; (commonly called Lord *James Cavendish*) the Duke's only brother then living, and *Henry Berkley*, Esq; of the third part; *William Cavendish*, Esq; (commonly called Marquis of *Hartington*) son and heir apparent of the Duke of *Devonshire*, and *James Cavendish*, Esq; (commonly called Lord *James Cavendish*) second son of the Duke, of the fourth part; *John*, Duke of *Rutland*, and *John Hanbury*, Esq; of the fifth part; and *Thomas Lewis*, *Edmond Probyn*, and *Andrew Charlton*, Esqrs. of the sixth part; reciting, that a marriage was then intended between Sir *William Morgan* and Lady *Rachael Cavendish*; it was witnessed, that in consideration thereof, and of 20,000 *l.* therein mentioned to be paid to Sir *William Morgan* by the Duke, as the marriage portion of Lady *Rachael*, Sir *William Morgan* did grant and release unto the said Lord *James Cavendish* (the brother) and *Henry Berkley*, and their heirs, all the manors, lands and hereditaments therein particularly mentioned and described in the counties of *Monmouth* and *Glamorgan*, to the several uses (to take effect from and after the solemnization of the marriage) therein aftermentioned, viz. As to the manors and lordships of *St. Bride*, and other the manors and hereditaments therein particularly mentioned, to the use of the Marquis of

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of *Hartington* and Lord *James Cavendish* (the son) for 100 years, in trust, to pay during the joint lives of Sir *William Morgan*, and Lady *Rachael*, the clear yearly sum of 500 *l.* for her separate use. And as to the premises comprised in the said term, after the determination thereof, and subject thereto, and also as to all other the premises, to the use of Sir *William Morgan* for his life, without impeachment of waste; remainder to the said Lord *James Cavendish* and *Henry Berkley*, and their heirs, in trust to preserve contingent remainders; remainder, as to the premises comprised in the said term of 100 years, to the intent that Lady *Rachael*, if she survived Sir *William Morgan*, should receive thereout, during her life, the clear yearly rent charge of 2000 *l.* in bar of dower, with a power of distress and entry in case of nonpayment thereof; with remainder to the Marquis of *Hartington* and Lord *James Cavendish* (the son) their executors, administrators and assigns, for a term of 99 years, for better securing the payment of the said yearly rent charge. And as to the manors of *Diffrin*, *Stow*, *Mendlegiffe* and *Ebbotb*, alias *Greenfield*, with the appurtenances, and the capital messuage called *Tredegar*, and the three parks lying contiguous, or near thereunto, and the Forge called *Tredegar Forge*, with their appurtenances; and as to all other the freehold messuages, farms, lands, tenements, woods, rents and hereditaments whatsoever, whereof or wherein Sir *William Morgan*, or any person or persons in trust for him, or to his use, had any estate of freehold or inheritance, in possession, reversion, remainder, or expectancy, situate, lying, and being within the manors, towns, parishes, villages, fields, precincts, or territories of *Diffrin*, *Bassabeg*, *Stow*, *Mendlegiffe*, *Ebbotb*, alias *Greenfield*, *St. Wooloes* and *Newport*, in the county of *Monmouth*, immediately after the death of Sir *William*, to the use of the Duke of *Rutland*, Lord *James Cavendish*, (the brother) *Henry Berkley* and *John Hanbury*, their executors, administrators and assigns, for 500 years, without impeachment of waste, upon the trusts aftermentioned. And as to the manors and premises thereby before granted and released, with their appurtenances, immediately from and after the determination of the several uses and estates therein before thereof respectively limited, and as the same uses and estates should respectively end and determine, to the use of the first and other sons of Sir *William Morgan*, on the body of Lady *Rachael* to be begotten, successively in tail male; remainder as to the premises comprised in the said term

of 500 years, to the use of the Marquis of *Hartington*, *Andrew Charlton*, *Thomas Lewis* and *Edmond Probyn*, their executors, administrators and assigns, for 1000 years, without impeachment of waste, on the trusts aftermentioned; remainder, as to the whole estate, to the use of Sir *William Morgan*, and his heirs and assigns for ever.

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The trusts of the term of 500 years were declared to be, in the first place, for indemnifying the manors, messuages, lands and premises, thereby charged with the said yearly rent charge of 2000 *l.* to Lady *Rachael* for her jointure, from all annuities or rent charges charged on the same premises by the will of the said *John Morgan*, or otherwise; and subject thereto, in case there should be any issue male of the body of Sir *William Morgan*, on the body of Lady *Rachael* begotten, who should for the time being, after the death of Sir *William*, be entitled to the immediate freehold and inheritance of the premises, expectant on the determination of the said term of 500 years, by virtue of any of the limitations aforesaid, and also one or more other child or children of Sir *William* by Lady *Rachael*, either born in his lifetime or after his decease, then the trustees should, after the decease of Sir *William*, by the ways and means therein mentioned, raise the following sum and sums of money, for the portion and portions of all and every the child or children of the said marriage, not entitled to the freehold of the same premises, expectant on the determination of the said term of 500 years, *viz.* in case there should be but one child, then 12,000 *l.* if two children and no more, then 16,000 *l.* and if three or more such children, then 18,000 *l.* for their portions, to be equally divided amongst them, share and share alike; the portions of sons to be paid at the age of 21, and the portions of daughters to be paid at their ages of 17, or days of marriage, which should first happen after the decease of Sir *William Morgan*, or sooner, if he should by any writing under his hand and seal, so direct and appoint; and upon further trust, in the mean time, from and after the decease of Sir *William*, until the portions should become payable, to raise such yearly sums for the maintenance and education of such younger children as therein mentioned: And in case any such children should die before his, her, or their respective portion or portions should become payable, that then the portion or portions of him, her, or them so dying, should go to the survivors, and survivor

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vivor of them, so nevertheless, that if there should be but one such surviving child, he or she should have no more than 12,000 *l.* by virtue of the said trust.

And the trusts of the 1000 years term were declared to be, that in case Sir *William Morgan* should die without issue male by Lady *Rachael*, or there being such issue male, all of them should die without issue male, before any of them should attain the age of 21, and that there should be issue one or more daughter or daughters of Sir *William* by Lady *Rachael*, at the time of such failure of issue male, or at any time afterwards, then the trustees, by the ways and means therein mentioned, should raise such sum and sums of money for the portion or portions of such daughter and daughters, as after mentioned; viz. if there should be but one such daughter, then the sum of 20,000 *l.* for the portion of such only daughter; and if two daughters and no more, then the like sum of 20,000 *l.* and if there should be three or more such daughters, then 24,000 *l.* to be equally divided amongst such three or more daughters, share and share alike, to be paid at their age of 21, or marriage, which should first happen after the decease of Sir *William*, or sooner if he should so direct; and on further trust, for raising yearly sums for the maintenance and education of such daughter or daughters; and in case any such daughter or daughters should die before such portion or portions should become payable, the portion or portions of her or them so dying, should go to the survivors and survivor of them; but so as that two such surviving daughters should have no more than 10,000 *l.* a piece, or one such surviving daughter should have no more than 20,000 *l.* by virtue of such trusts.

And after reciting, that Sir *William Morgan* was seised to him and his heirs, according to the custom of the manor of *Liswerry*, in the county of *Monmouth*, of divers lands in the parish of *Nash*, containing, by estimation, 14 acres and a half, held of the said manor by copy of court roll, and that he was also seised to him and his heirs, according to the custom of the manor of *Rumpney*, in the said county of *Monmouth*, of and in a messuage or tenement, and divers lands or grounds thereunto belonging or therewith used, in the parish of *Rumpney*, containing by estimation 16 acres, held of the said manor of *Rumpney* by copy of court roll (the tenures of both which manors were borough English)

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English) Sir *William*, for the considerations aforesaid, covenanted that he would effectually surrender, or cause to be surrendered, the said copyhold messuage, lands and premises, with their appurtenances, to such and the same uses, trusts, intents and purposes, as his freehold lands, tenements and hereditaments, in the parishes of *Nash* and *Rumpney*, were by the said indenture of release settled, limited and assured, or as near as the same could be done.

And after further reciting, that by indenture of lease, dated the 31st of *July* then last, made between the Dean and Chapter of the Cathedral Church of *Bristol*, of the one part, and Sir *William Morgan* of the other part; the Dean and Chapter for the considerations therein mentioned, did demise, grant, and to farm let, unto Sir *William Morgan*, their manor of *Peterstone*, with the appurtenances in the said county of *Monmouth*, and other hereditaments therein mentioned, for the term of 21 years, then next ensuing, at the yearly rent therein mentioned: It was witnessed, that for the considerations aforesaid, Sir *William Morgan* did assign unto Lord *James Cavendish* (the brother) and *Henry Berkley*, the said manor and premises comprised in the said lease, upon trust, out of the rents and profits of the said premises, at the end of every seven years, to renew the lease, and to permit the residue of such rents and profits to be received by Sir *William Morgan* and his assigns, during so many years of the said term of 21 years, or any further term to be from time to time taken of the premises, as he should happen to live; and after his death, in trust, for the better and more effectually securing the said yearly rent charge of 2000 *l.* to Lady *Rachael*; and after the death of Sir *William Morgan*, and subject to the raising, paying, and securing the said rent charge, in trust, to permit the rest and residue of the profits of the premises to be received by the first and other sons of the marriage, and the executors, administrators and assigns of such sons respectively; and in default of such issue male, then, in trust for Sir *William Morgan*, his executors, administrators and assigns.

Soon after executing this settlement, the marriage took effect, and afterwards Sir *William* not only surrendered the 14 acres and an half, and 16 acres of customary land to the uses of the settlement, in performance of his covenant; but being also at the

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time of his marriage seised of, or equitably entitled to other customary estates, within the several manors of *Rumpney, Wentlock*, alias *Kenisham, Liswerry, Gouldcliffe, Abercarn* and *Rogerstone*, in the county of *Monmouth*, at courts held for these manors, he voluntarily surrendered all his copyhold messuages, lands and tenements in the said several manors, to the use of *Samuel Pratt*, and his customary heirs; and *Pratt* was thereupon admitted thereto, and upon such admissions, memorandums were made or entered on the court rolls of the manors respectively, declaring, that *Pratt* and his customary heirs, should stand seised of all the said surrendered premises, in trust for such uses, intents and purposes, as the freehold lands and hereditaments of *Sir William Morgan*, in the same parishes respectively where such copyhold or customary messuages, lands and tenements did severally lie, were limited and declared by the said indenture of release, of the 14th of *May* 1723. But several other of his customary estates, were neither surrendered, nor covenanted to be surrendered to the uses of his marriage settlement, nor to any other use.

Sir William Morgan after his marriage, purchased the fee simple of several freehold estates in the counties of *Monmouth* and *Glamorgan*, and several customary estates in the county of *Monmouth*, which customary estates were surrendered to trustees, in trust for *Sir William* and his heirs; and which freehold estates, so purchased, lying in the counties of *Monmouth* and *Glamorgan*, he in *January* 1730, mortgaged to *Mr. John Pagett* for securing 5000*l.* and interest; and he also mortgaged all his freehold estates in the county of *Brecon* to other persons for securing 11,000*l.* but he did not mortgage his customary estate in that county.

Sir William Morgan had issue by *Lady Rachael* two sons, viz. *William* his eldest, and *Edward* his youngest son, and two daughters, viz. *Rachael Morgan* and the appellant *Elizabeth*, wife of the appellant *William Jones*.

On the 24th of *April* 1731, *Sir William* died, having previously made the following will: " In the name of God, Amen;
 " this 3d day of *April*, in the year of our Lord 1731: I *Sir*
 " *William Morgan* of *Tredegar*, in the county of *Monmouth*,
 " Knight of the Bath, being sound in mind, and of perfect
 " memory

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“ memory and understanding, thanks be therefore given to Al-
 “ mighty God, do make and ordain this my present last will and
 “ testament, in manner and form following ; (that is to say)
 “ first and principally, I commend my soul to the hands of
 “ Almighty God, and my body to be buried in Christian man-
 “ ner, at the discretion of my executors hereinafter named. *Im-*
 “ *primis*, I give and bequeath the use of all and singular my
 “ jewels, with their appurtenances, unto my dear and well beloved
 “ wife, Lady *Rachael Morgan*, for and during her natural life;
 “ and immediately from and after her decease, I give and be-
 “ queath all my said jewels, with their appurtenances, unto my
 “ eldest son *William Morgan*, his heirs, executors, administrators
 “ and assigns for ever ; but in case my said son *William Morgan*
 “ shall happen to die without issue of his body lawfully begot-
 “ ten, and living at the time of his death, then I give and be-
 “ queath all my said jewels, with their appurtenances, unto
 “ my youngest son *Edward Morgan*, his heirs, executors, ad-
 “ ministrators and assigns for ever. *Item*, I give unto my said
 “ dear and loving wife, my best chariot, and my best set of
 “ coach-horses ; I also give unto my said wife, the use of all my
 “ household goods and implements of household goods and fur-
 “ niture whatsoever, now remaining and being within my house
 “ situate, lying, and being in *King-Street*, near *St. James's Square*
 “ *London*, and thereunto belonging, for the term of her natural
 “ life ; and after her death, I give and bequeath all the said
 “ household goods, implements of household goods and fur-
 “ niture, to my said eldest son *William Morgan*, his executors,
 “ administrators and assigns for ever. I also give and bequeath
 “ to my eldest son *William Morgan*, all and singular my hous-
 “ hold goods, furniture and implements of what nature or kind
 “ soever the same be, remaining, belonging and being in and
 “ to my capital messuage called *Tredegar House*, and in the out-
 “ houses thereunto belonging, and all my plate of all sorts and
 “ kind soever the same be, remaining or in any wise belonging to
 “ the said capital messuage called *Tredegar House*, or remaining or
 “ being in any other place or places whatsoever ; but in case my
 “ said eldest son shall happen to die without issue of his body law-
 “ fully begotten, then I bequeath and give all my said hous-
 “ hold stuff and plate last mentioned, to my said youngest son
 “ *Edward Morgan*, his executors, administrators and assigns for
 “ ever.”

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“ I also give and bequeath all and singular my personal estate,
 “ goods, cattle, and chattels whatsoever, and wheresoever the
 “ same shall be (and not herein before given), to the most Noble
 “ *William Duke of Devonshire*, *Sir Edmond Probyn*, Knt. one
 “ of the Justices of the Court of King’s Bench at *Westminster*,
 “ my well beloved brother *Thomas Morgan* of *Ruperra*, in the
 “ county of *Glamorgan*, Esq; and *John Hanbury* of *Pontypool*, in
 “ the county of *Monmouth*, Esq; and the survivors and survivor
 “ of them, and the executors and administrators of such sur-
 “ vivors or survivor, upon this special trust, and to the end, in-
 “ tent and purpose, that they the said *William Duke of Devon-*
 “ *shire*, *Sir Edmond Probyn*, *Thomas Morgan*, and *John Hanbury*,
 “ and the survivor of them, shall and will sell and dispose the
 “ same, and the money arising from such sale to be applied and
 “ paid, as far as the same shall extend and reach, for and towards
 “ the payment of my just debts with all convenient speed : And
 “ for the better enabling my executors hereafter named, to pay
 “ all such debts, that shall remain unpaid by the money arising
 “ out of my rents and arrears of rents, and by the sale of that
 “ part of my said personal estate last mentioned, and intended
 “ to be sold for that purpose ; and also for the payment of my
 “ funeral expences, and of the legacies and payments, and other
 “ disbursements hereinafter bequeathed and mentioned, I give
 “ and devise all and singular my freehold and customaryhold
 “ messuages, lands, tenements, and hereditaments whatsoever
 “ and wheresoever, and by me purchased since my intermarriage,
 “ and whereof I am seised in fee simple, or I have any equity
 “ of redemption therein, and situate, lying and being within the
 “ counties of *Monmouth* and *Glamorgan*, with their and every
 “ of their appurtenances ; and also all and singular my manors
 “ and lordships, messuages, farms, lands, tenements and here-
 “ ditaments whatsoever, situate and lying within the county of
 “ *Brecon*, and the reversion and reversions, remainder and re-
 “ mainders, rents, issues, profits, and equity of redemption, of
 “ all and singular the said premises, with the appurtenances,
 “ unto the said *William Duke of Devonshire*, *Sir Edmond Probyn*,
 “ *Thomas Morgan*, and *John Hanbury*, and the survivor of them,
 “ and the heirs of such survivor, for ever ; in trust neverthe-
 “ less, and to and for the several and respective estates, uses, in-
 “ tents, and purposes, and subject nevertheless and charged and
 “ chargeable for and with the payments, and under and sub-
 “ ject

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“ject to the provisos, limitations, intails, and appointments
 “herein after mentioned, created, limited, appointed and de-
 “clared of and concerning the same; (that is to say) to the in-
 “tent and purpose; and upon trust, that the said *William Duke*
 “of *Devonshire*, *Sir Edmond Probyn*, *Thomas Morgan* and *John*
 “*Hanbury*, and the survivor of them, and the heirs and assigns
 “of such survivor, shall, in the first place, raise and levy by the
 “yearly rents, issues and profits of all and singular the said pre-
 “mises, with the appurtenances, or by sale or mortgage of
 “the same premises, or some convenient part thereof, as to
 “them, or any of them may be thought most proper and con-
 “venient, such sufficient and competent sum and sums of mo-
 “ney, to be in aid of my personal estate herein before be-
 “queathed, for and towards the payment of my just debts,
 “funeral expences, and legacies hereinafter mentioned and be-
 “queathed.”

“And further my will and meaning is, that my said youngest
 “son *Edward Morgan*, when he shall have attained the age of
 “21 years, shall by good and sufficient surrenders, or other-
 “wise as council shall and will advise, pass and surrender, all
 “and singular the right, title and interest whatsoever, of him the
 “said *Edward Morgan*, of and in all and singular the customary-
 “hold and copyhold messuages, lands and tenements whatso-
 “ever, that I shall die seised of within the county of *Monmouth*,
 “to the use and behoof of my said eldest son *William Morgan*,
 “his heirs and assigns for ever.”

“My farther will and meaning is, that the said *William Duke*
 “of *Devonshire*, *Sir Edmond Probyn*, *Thomas Morgan* and *John*
 “*Hanbury*, and the survivor of them and his heirs, shall stand
 “and be seised of all and singular the messuages, farms, lands,
 “tenements and hereditaments whatsoever, and situate, lying
 “and being within the several parishes of *Ushodgunlais*, *Ushod-*
 “*velly*, *Vayner*, *Cantriff*, *Penderrin*, in the said county of *Bre-*
 “*con*, and also all my messuages, farms, lands, tenements and
 “hereditaments, now or late in the several occupations of

“*Lewellin*, *Edward* and *Thomas Powell*, respectively tenants
 “thereof, at the yearly rent of 37*l.* 19*s.* situate, lying and being
 “within the parish of *Devynock*, in the county of *Brecon*, im-
 “mediately from and after all my debts, funeral expences and
 “legacies,

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“ legacies, and payments hereinafter mentioned, well and fully
 “ paid and discharged, and also all charges and expences as my
 “ said trustees and executors herein named be put to, be fully
 “ reimbursed and paid them in the execution of this my last
 “ will and testament, and the trust in them respectively repos-
 “ ed; to the use and behoof of my said youngest son *Edward*
 “ *Morgan* and his assigns, for and during his natural life, with-
 “ out impeachment of or for any manner of waste; and from
 “ and after his decease, to the use and behoof of the heirs male
 “ of the body of the said *Edward Morgan*, lawfully to be be-
 “ gotten, severally, respectively and in remainder, the one after
 “ the other, as they and every of them shall be in priority of
 “ birth and seniority of age; and for default of such issue male,
 “ to the use and behoof of my said son *William Morgan*, for and
 “ during the term of his natural life, without impeachment
 “ of or for any manner of waste; and from and after the de-
 “ cease of my said son *William Morgan*, to the use and behoof
 “ of the heirs male of the body of my said son *William Morgan*,
 “ lawfully to be begotten, severally, respectively and in remain-
 “ der, the one after the other, as they and every of them shall
 “ be in priority of birth and seniority of age; and for default of
 “ such issue, to the use and behoof of such other son of mine
 “ lawfully begotten, as shall or may hereafter be born, for his
 “ life, without impeachment of or for any manner of waste;
 “ and from and after the decease of such after-born son, to
 “ the heirs male of his body lawfully issuing, in remainder,
 “ the one after the other; and for want of such issue, to the
 “ use and behoof of my said brother *Thomas Morgan* and his
 “ assigns, for and during the term of his natural life, with-
 “ out impeachment of or for any manner of waste; and from
 “ and after his decease, to the use and behoof of the heirs
 “ male of the body of my said brother *Thomas Morgan*, lawfully
 “ begotten and to be begotten, severally, respectively and in re-
 “ mainder, the one after the other, as they and every of them
 “ shall be in priority of birth and seniority of age; and for want
 “ of such issue, in remainder of all and singular the same pre-
 “ mises, with the appurtenances, to the use and behoof of my
 “ said son *Edward Morgan*, his heirs and assigns for ever.”

“ And my farther will and meaning is, that the said *William*
 “ *Duke of Devonshire*, *Sir Edmond Probyn*, *Thomas Morgan*, and
 “ *John Hanbury*, and the survivor of them, and the heirs of such
 “ survivor

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“survivor, immediately from and after all my debts, funeral
 “expences, legacies and payments herein mentioned, be well
 “and fully paid and discharged, and also all charges and expences,
 “as my said trustees and also my executors hereinafter named
 “be put to, be fully reimbursed and paid them in the execu-
 “tion of this my last will and testament, and the trust in them
 “respectively reposed; shall also stand and be seised of all my
 “messuages, farms, lands, tenements and hereditaments, and the
 “equity of redemption thereof, herein and hereby before devis-
 “ed, and mentioned to be in the several counties of *Monmouth*
 “and *Glamorgan*, and all my manors, royalties, messuages, farms,
 “lands, tenements, and hereditaments whatsoever, situate and
 “being within the county of *Brecon*, (except the messuages,
 “farms, lands, tenements and hereditaments, herein before men-
 “tioned and devised to my said son *Edward Morgan*, in manner
 “as aforesaid) to the use and behoof of my said eldest son *Wil-*
 “*liam Morgan*, and his assigns, for and during the term of his
 “natural life, without impeachment of or for any manner of
 “waste; and from and after his decease, to the use and behoof
 “of the heirs male of the body of my said son *William Morgan*,
 “lawfully to be begotten, severally, respectively and in remain-
 “der, the one after the other, as they and every of them shall be
 “in priority of birth, and seniority of age; and in default of
 “such issue male, to the use and behoof of my said youngest son
 “*Edward Morgan* and his assigns, for and during the term of
 “his natural life, without impeachment of or for any manner of
 “waste; and from and after his decease, to the use and behoof
 “of the heirs male of the body of my said son *Edward Mor-*
 “*gan*, lawfully to be begotten, severally, respectively and in
 “remainder, the one after the other, as they and every of them
 “shall be in priority of birth and seniority of age; and for
 “default of such issue male, to the use and behoof of such
 “other son of mine, lawfully begotten or to be begotten, as
 “shall or may hereafter be born, for his life, without impeach-
 “ment of waste; and after the decease of such after-born son,
 “to the heirs male of his body lawfully to be begotten in re-
 “mainder, the one after the other; and for want of such issue
 “male, then to the use and behoof of my said brother *Thomas*
 “*Morgan*, for and during the term of his natural life, without
 “impeachment of or for any manner of waste; and from and after
 “his decease, to the use and behoof of the heirs male of the body
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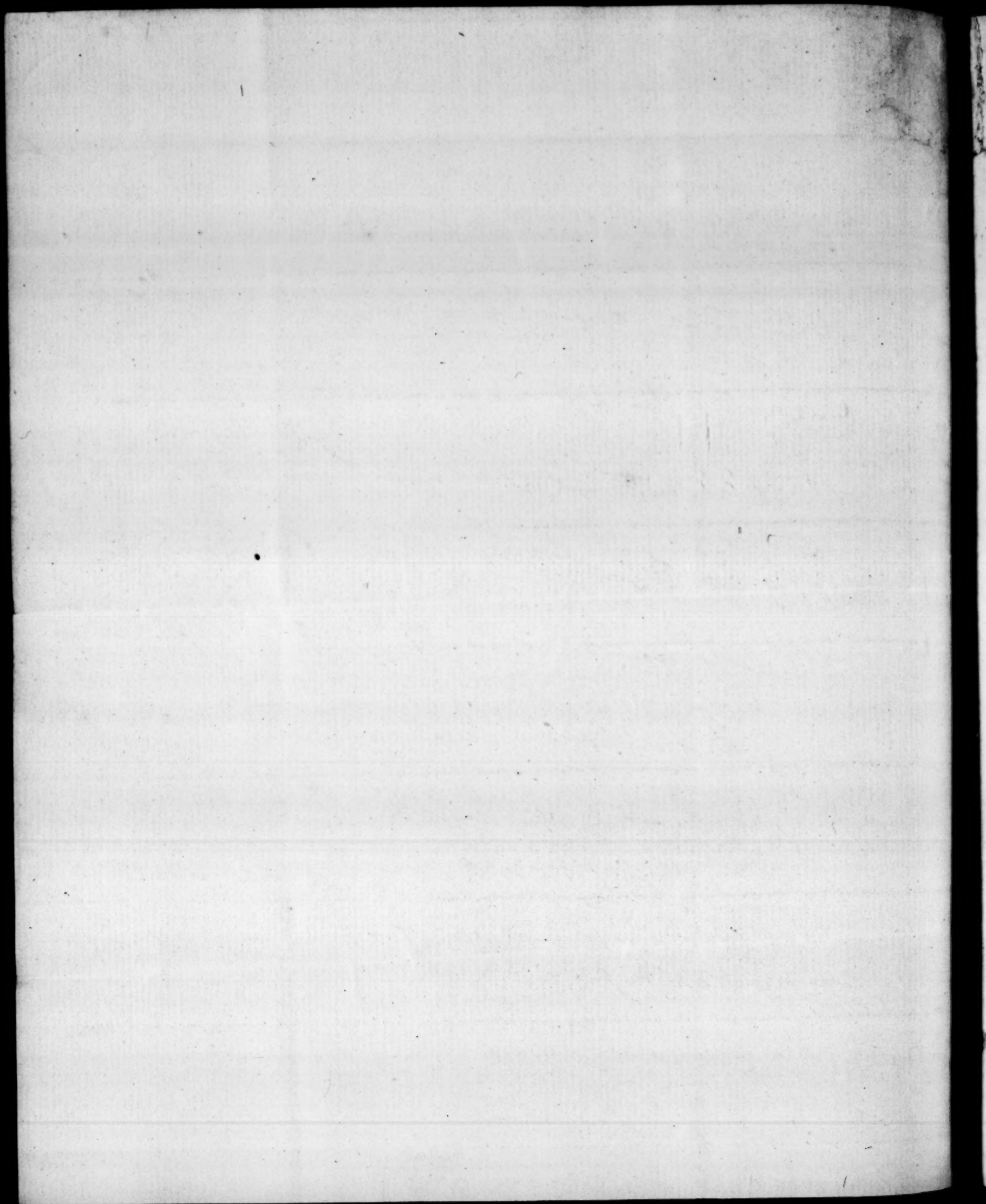
“ of my said brother *Thomas Morgan*, lawfully begotten and to
 “ be begotten, severally, respectively and in remainder, the one
 “ after the other, as they and every of them shall be in priority of
 “ birth and seniority of age ; and for default of such issue male,
 “ the remainder of all and singular the said last mentioned pre-
 “ mises, with the appurtenances, to the use and behoof of
 “ the right and next heirs of my said son *William Morgan*, for
 “ ever.

“ And for as much as it is my will, intent and meaning,
 “ that in case my said two sons, now living, or any other son
 “ or sons of mine, lawfully begotten hereafter to be born,
 “ should die without issue male of their bodies, or of the body
 “ of some or one of them, lawfully to be begotten ; after their
 “ respective decease without issue male as aforesaid, that then,
 “ all and singular my messuages, manors, royalties, advowsons,
 “ parks, lands, tenements and hereditaments whatsoever and
 “ wheresoever, with their and every of their appurtenances,
 “ situate, lying and being within the several counties of *Mon-*
 “ *mouth* and *Glamorgan*, and not herein before devised, shall be
 “ devised and settled to and for the several uses, intents and
 “ purposes herein after mentioned, limited, expressed and de-
 “ clared ; it is therefore my will, intent and meaning, that in
 “ case my said sons, *William Morgan* and *Edward Morgan*, or
 “ any other son or sons of mine, hereafter to be born as afore-
 “ said, shall happen to die respectively, without any issue male
 “ of their bodies, or of the body of some or one of them as
 “ aforesaid, and in such case, if it shall so happen, then I give
 “ and devise the remainder of all and singular my messuages,
 “ manors, royalties, advowsons, parks, lands, tenements and
 “ hereditaments, whatsoever and wheresoever, with their and
 “ every of their appurtenances, and situate, lying and being
 “ within the several counties of *Monmouth* and *Glamorgan*, and
 “ not herein and hereby before devised, and the reversion and
 “ reversions, remainder and remainders of the same premises, to
 “ my said brother *Thomas Morgan*, for and during the term of
 “ his natural life, without impeachment of or for any manner
 “ of waste ; but subject nevertheless, to the several provisoes and
 “ payments mentioned and contained in my said marriage settle-
 “ ments bearing date the 14th day of *May*, in the year of our
 “ Lord 1723 ; and from and after the estate hereby last men-
 “ tioned,

I think he should have
you are entitled to appellant
sawed there that a mortgage
could not be made for himself

So as I think ~~unintentionally~~ called
the tenant-right - There seems
chronology between this case &
not - I wish to know in

particular if you are answered
any case upon the tenant right in
which request was made between him
this mortgage -





Recd 19. Nov.
1791.

per Hargrave

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tioned, limited to my said brother *Thomas Morgan*, I give
 and devise all and singular the said last mentioned premises,
 with their and every of their appurtenances hereby devised,
 to *Thomas Lewis* of *St. Peer*, in the county of *Monmouth*,
 Esquire; and *Charles Van* of *Lanevern*, in the said county of
Monmouth, Esquire, and their heirs, for and during the na-
 tural life of my said brother *Thomas Morgan*, to the intent
 to preserve and support the contingent uses and remainders
 herein after limited, (in case my said two sons, or any other
 son or sons of mine, hereafter to be born, shall happen to die
 without issue male of their bodies, or of the body of some or
 one of them, lawfully to be begotten) but nevertheless, if it
 should so happen, in trust to permit my said brother *Thomas*
Morgan, to receive the rents, issues and profits thereof, dur-
 ing his natural life; and from and after the decease of my
 said brother *Thomas Morgan*, then to be and remain to *Thomas*
Morgan, the only son of my said brother *Thomas Morgan*,
 for and during the natural life of him the said *Thomas Mor-*
gan the younger, without impeachment of or for any manner
 of waste; and after the determination of that estate, to the
 use and behoof of the said *Thomas Lewis* and *Charles Van*, and
 their heirs, during the natural life of the said *Thomas Mor-*
gan the younger, upon trust to support the contingent uses
 and estates herein after limited, from being defeated and de-
 stroyed, and for that purpose to make entries and bring ac-
 tions as the case shall require, but nevertheless to permit and
 suffer the said *Thomas Morgan* the younger, to receive and
 take the rents, issues and profits of all the said premises, with
 their appurtenances, during his natural life; and from and
 after the decease of the said *Thomas Morgan* the younger, to
 the use and behoof of the first son of the body of the said
Thomas Morgan the younger, and the heirs male of the body
 of such first son lawfully issuing; and for default of such
 issue, to the use and behoof of the second son of the body of
 the said *Thomas Morgan* the younger, and the heirs male of the
 body of such second son lawfully issuing; and for default of such
 issue, to the use and behoof of the third, fourth, fifth, sixth,
 seventh, eighth, ninth and tenth son, and all and every other
 son and sons of the body of the said *Thomas Morgan* the
 younger, lawfully issuing, severally and successively, and in re-
 mainder, the one after the other, as they and every of them
 shall

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“ shall be in priority of birth and seniority of age, the elder of
 “ such son and sons, and the heirs male of his body issuing,
 “ to be always preferred and to take place before the younger of
 “ such son and sons; and for default of such issue, to the use
 “ and behoof of the second son of the body of my said brother
 “ *Thomas Morgan*, and the heirs male of the body of such se-
 “ cond son lawfully issuing; and for default of such issue, to the
 “ use and behoof of the third, fourth, fifth, sixth, seventh,
 “ eighth, ninth and tenth sons, and all and every other the
 “ son and sons of the body of my said brother *Thomas Mor-*
 “ *gan*, lawfully issuing, severally, successively and in remain-
 “ der, the one after the other, as they and every of them shall
 “ be in priority of birth and seniority of age, the elder of such
 “ son and sons and the heirs male of his body issuing, to be al-
 “ ways preferred and to take place of the younger of such son or
 “ sons; and for default of such issue, to the use and behoof of
 “ my right and next heirs for ever; and to and for none other
 “ use, intent and purpose whatsoever.

“ Provided always, and my farther will and meaning is, that it
 “ shall and may be lawful to and for my said eldest son *William*
 “ *Morgan*, at any time during his natural life, to settle and con-
 “ vey in jointure or jointures, any part of my messuages, lands,
 “ tenements and hereditaments, that he shall be hereafter in
 “ possession of, to any wife or wives, as he shall hereafter hap-
 “ pen to marry, in such manner, and to such uses, limitations,
 “ intents and purposes as he shall think fit; and by any deed or
 “ deeds, or by any other instrument in writing to be by him
 “ duly executed, in the presence of two or more credible wit-
 “ nesses, to charge all or any of the messuages, manors, royal-
 “ ties, lands, tenements and hereditaments, with the appurte-
 “ nances, for and with the payment or payments for raising of
 “ fortunes and portions, to and for any child or children as my
 “ said son *William Morgan* shall have of his body lawfully be-
 “ gotten, in such proportions, and to be raised and paid in such
 “ manner and sort, and at such times as he shall limit and ap-
 “ point. And also my will and meaning is, that it shall and may
 “ be lawful to and for my said son *Edward Morgan*, or any
 “ other hereafter born son of mine as aforesaid, and for every of
 “ them respectively, at any time or times, during their respective
 “ lives, to settle and convey in jointure or jointures any part of
 “ all

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“ all my messuages, manors, lands, tenements and heredita-
 “ ments, that they or either of them respectively shall here-
 “ after be in possession of, to any wife or wives as they or either
 “ of them shall happen to marry, in such manner and to such
 “ uses, limitations, intents and purposes, as they or either of
 “ them respectively shall think fit; and by any deed or deeds,
 “ or by any other instrument in writing, to be by them or ei-
 “ ther of them duly executed in the presence of two or more
 “ credible witnesses, to charge all or any of the messuages,
 “ manors, royalties, lands, tenements and hereditaments, with the
 “ appurtenances, for and with the payment and payments for
 “ raising of fortunes and portions, to and for any child or children
 “ as my said son *Edward Morgan*, or any other after-born son of
 “ mine shall have of their respective bodies lawfully to be be-
 “ gotten, in such proportions, and to be raised and paid in such
 “ manner and sort, and at such times, as they or either of them
 “ shall hereafter be in possession of shall limit and appoint.

“ And my farther will and meaning is, that it shall and may
 “ be lawful, to and for my said eldest son *William Morgan*, and
 “ my youngest son *Edward Morgan*, or any other after-born son
 “ of mine respectively, when they or either of them shall be in
 “ possession of my messuages, manors, lands, tenements and
 “ hereditaments, or any part thereof, to grant any leases or
 “ grants, under their or either of their hands and seals respec-
 “ tively, of the said premises or any part thereof, for any term
 “ or terms of years, not exceeding one and twenty years, or for
 “ the term of lives, not exceeding three lives; so as upon such
 “ leases or grants to be made and granted, there be reserved the
 “ accustomed and antient rents, any thing herein before con-
 “ tained to the contrary, in any wise notwithstanding.

“ And my farther will and meaning is, and I do hereby fig-
 “ nify and declare, that my devise herein before mentioned, for
 “ the use and benefit of my said youngest son *Edward Morgan*,
 “ is and shall be over and above the provision provided and
 “ granted for the benefit of my younger children, mentioned in
 “ my said marriage settlement; and my will and meaning is,
 “ that my said son *Edward Morgan* shall have the full benefit of
 “ the provision mentioned in my said marriage settlement, as
 “ one of my younger children, notwithstanding the said devise



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“ last mentioned for his benefit ; any thing in the said marriage
 “ settlement contained and mentioned to the contrary, in any
 “ wife notwithstanding.

“ Provided always, and my will, intent and meaning is, that
 “ my said brother *Thomas Morgan*, and his son *Thomas Morgan*
 “ the younger, respectively, when they shall respectively be in
 “ possession of the said manors, messuages, lands, tenements and
 “ hereditaments, or any part thereof, limited to them respective-
 “ ly, for the term of their respective lives, by virtue of the limita-
 “ tions herein mentioned, shall and may grant any lease or grant
 “ under their or either of their hands or seals, of the said premises,
 “ or any part or parts thereof, for any term or terms of years not
 “ exceeding one and twenty years, or for the term of lives not ex-
 “ ceeding three lives, so as upon every such leases and grants
 “ to be made and granted, there be reserved the accustomed and
 “ antient rents.

“ Also I give and bequeath to my said eldest son *William Mor-*
 “ *gan*, all and singular my personal estate whatsoever, (and not
 “ herein before given and bequeathed) that shall remain and be,
 “ over and above the payment of my debts, and funeral ex-
 “ pences, and other payments herein before mentioned. And I
 “ do hereby nominate and appoint the said *William Duke of*
 “ *Devonshire*, my said dearly beloved wife, *Sir Edmond Probyn*,
 “ my said brother *Thomas Morgan*, and *John Hanbury*, Esqrs.
 “ guardians of such and so many of my children, as shall be
 “ under age at the time of my death ; and I commit the whole
 “ care and management of my said children and their respective
 “ persons, education, estate and fortunes, to their care and
 “ management, during their respective minority : And I do
 “ hereby ordain, nominate and appoint the said *William Duke*
 “ of *Devonshire*, my dear and well beloved wife *Lady Rachael*
 “ *Morgan*, and my brother *Thomas Morgan*, to be executors of
 “ this my last will and testament.”

Edward Morgan, the testator's younger son, died on the 7th of
February 1743, an infant, of the age of 16 only, and without
 issue.

William Morgan, the testator's eldest son, attained his age of
 21, in 1746, and entered upon the said estates, and enjoyed the
 same

same during his life, and died on the 16th of July 1763, unmarried and intestate, and without having barred the intail created by the said settlement or will, leaving the appellant *Elizabeth*, his only sister and heir at law; her sister *Rachael Morgan* having died on the 11th of March 1738, an infant and unmarried; and the said *Elizabeth* attained her age of 21, on the 29th of March 1750.

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Sir *William Morgan* being greatly indebted at his decease, more than his personal estate was sufficient to pay, *Thomas Davies*, and *Thomas Panton*, Esqrs; on behalf of themselves and the other creditors of Sir *William*, exhibited their bill in Chancery, against Lady *Rachael Morgan* the widow of Sir *William*, the said *William Morgan* and *Edward Morgan*, both then infants, and against the said *Thomas Morgan*, the brother of Sir *William*, and the Duke of *Devonshire*, Sir *Edmond Probyn* and *John Hanbury*, in order to have the trusts of Sir *William Morgan's* will performed, for payment of his debts, and for other purposes; and upon hearing that cause, before the Master of the Rolls, on the 26th of February 1731, his honour declared the will of Sir *William Morgan* to be well proved, and that the same ought to be performed, and the trusts thereof established, and decreed the same accordingly; and several directions were thereby given, in pursuance whereof, and of other proceedings in the cause, the castle and manor of *Brecon*, and several other messuages, lands and tenements, in the counties of *Brecon*, *Monmouth* and *Glamorgan*, part of Sir *William Morgan's* estate, were conveyed to *Samuel Savage*, Esq; by way of mortgage, for securing 20,000 l.

John Duke of Rutland survived the other trustees, to whom the term of 500 years was limited by the settlement; and Lord *George*, Lord *Frederick*, and Lord *John Cavendish*, became the personal representatives of the survivor of the trustees of the term of 1000 years.

Upon the death of the said *William Morgan*, the son and heir of Sir *William*, without issue male, the said *Thomas Morgan* the brother of Sir *William*, immediately took attornments from all the tenants, and entered on the whole estate, both freehold and customaryhold: And on the 6th of May 1765, the said *Thomas Morgan*, together with *Thomas* and *Charles Morgan* his sons, preferred

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preferred their bill in the Court of Chancery, against the appellant *Elizabeth*, the Duke of *Rutland*, Lord *George*, Lord *Frederick*, and Lord *John Cavendish*, stating the settlement of *May* 1723, and that Sir *William Morgan* was not tenant, or seised of or entitled to any of the said customary lands or tenements, otherwise than under the trusts thereof declared as aforesaid; all the said customary estates having been surrendered to, and the legal estate therein vested in trustees and their heirs, long before the time of Sir *William Morgan*'s making his said will (except as to a moiety of certain gavelkind lands within the manor of *Bassaleg*, which had formerly belonged to *William Morgan* of *Gray's Inn*, if any such should appear to have been of such custom); and insisting, that there was no need of any surrender to the uses of Sir *William Morgan*'s will, as to any of the said customary lands and tenements, of which he was not actually tenant, he not being capable of making such surrender, according to the custom of the said respective manors, and that the equitable estate therein was well devised by the will: And therefore the bill prayed, that the will of Sir *William Morgan* might be established, both as to the freehold and customary estates devised to the said *Thomas Morgan* the father for his life, with the several remainders over, as expressed by the said will; and that the appellant *Elizabeth* might deliver up on oath to the plaintiffs, or for their use, all such settlements, deeds, writings, books, papers, copies of court roll and evidences, as any way concerned Sir *William Morgan*'s real estates, which had come to her possession or power, and which did not immediately relate to the security of her portion; and might, upon payment of what should appear to be due to her for principal and interest of her said portion of 12,000 *l.* deliver up the possession of Sir *William Morgan*'s marriage settlement, and all other deeds and writings relating thereto; and that the plaintiffs might by injunction be quieted in the possession and enjoyment of the said several customary messuages and lands, and that the Duke of *Rutland*, the surviving trustee of the 500 years term, might, on payment of what should appear to be due to the appellant *Elizabeth* for her portion, assign the said term as the plaintiffs should appoint; and that Lord *George*, Lord *Frederick*, and Lord *John Cavendish*, the trustees of the 1000 years term, might assign the same to attend the inheritance of the said freehold premises.

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The appellant *Elizabeth*, by her answer to this bill, said she believed, that after the customary estates in the manors therein mentioned were surrendered to the trustees therein named, no surrender was ever made from them, but that the legal estate thereof remained vested in their respective customary heirs, and that *John Morgan* being only entitled to the equitable interest in such customary estates, therefore the same never became freehold, nor were the customaryhold tenures suspended or extinguished in the hands of the said *John Morgan*, or of any other subsequent lord or owner of the said manors; that in consequence of the devises and directions of the will of the said *John Morgan*, whatever interest the said *Thomas Morgan* had in such customaryhold estates, he became and was a trustee therein for Sir *William Morgan*, and that Sir *William* held and enjoyed all the said customaryhold messuages and lands accordingly. But the appellant *Elizabeth* insisted, that by the devise in her father's will, of "all his freehold and customaryhold messuages, lands, tenements and hereditaments whatsoever and wheresoever, and by him purchased since his intermarriage, and whereof he was seised in fee simple, or wherein he had any equity of redemption, and which were situate, lying or being in the counties of *Monmouth* and *Glamorgan*, with their appurtenances, and also all and singular his manors and lordships, messuages, farms, lands, tenements and hereditaments whatsoever, situate and lying within the county of *Brecon*; and the reversion and reversions, remainder and remainders, rents, issues, profits and equity of redemption of all and singular the said premises, with the appurtenances, unto the said *William Duke of Devonshire*, Sir *Edmond Probyn*, *Thomas Morgan* and *John Hanbury*, in trust to and for the uses, intents and purposes therein mentioned;" no other estates whatsoever in the said counties of *Monmouth* and *Glamorgan* passed to the trustees, but only such as were purchased by the testator after his marriage. And she submitted to the judgment of the court, whether, by the said devise, the equitable estate and interest which the testator, at the time of making his will, had in the said copyhold and customary messuages, lands and tenements, held of the manor of *Brecon*, passed to the trustees; especially if it should appear, that his freehold estates in the said county of *Brecon*, and his freehold and copyhold estates purchased by him after his marriage, together with his personal estate, not specifically devised, were exclusive of the

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said copyhold, messuages, lands and tenements in the said manor of *Brecon*, more than sufficient to pay his debts and funeral expences. She likewise submitted, whether, as the testator by his will expressed it to be his intent and meaning, “ that in case
 “ his said sons *William Morgan* and *Edward Morgan*, or any
 “ other son or sons of his lawfully to be begotten, thereafter to
 “ be born, should happen to die respectively, without any issue
 “ male of their bodies, or of the body of some of them, as afore-
 “ said; and in such case, if it should so happen, then he gave
 “ and devised the remainder of all and singular his messuages, ma-
 “ nors, royalties, advowsons, parks, lands, tenements and heredi-
 “ taments whatsoever and wheresoever, with their and every of
 “ their appurtenances, and situate lying and being within the se-
 “ veral counties of *Monmouth* and *Glamorgan*, and not therein and
 “ thereby devised before, and the reversion and reversions, remain-
 “ der and remainders of the said premises, to his said brother *Tho-*
 “ *mas Morgan*, for and during the term of his natural life, with-
 “ out impeachment of or for any manner of waste, but subject ne-
 “ vertheless, to the several provisos and payments mentioned and
 “ contained in his said marriage settlement, with such remainders
 “ over as therein were mentioned;” the said devise comprised
 and included the equitable estates and interests, which the testator, at the time of making his said will, had or was entitled to in possession to him and his heirs, of and in his customaryhold estates; and also, whether the devise not being to take effect but on failure of the the testator’s issue male generally, which implied a failure of issue male not only by his then wife *Lady Rachel*, but by any other wife whom he might, at the most remote distance of time after making the said will, happen to marry, the said devise was not therefore more remote than the law allowed, and consequently void; especially if the Court should be of opinion, that the said devise comprised and included the equitable estate and interest, which the testator, at the time of making his will, had or was entitled to in possession to him and his heirs, of and in the customaryhold estates. The appellant *Elizabeth* further insisted, that she was entitled to all such freehold and copyhold or customary estates, whereof or wherein *Sir William Morgan*, at the time of making his will, had or was entitled to any legal or equitable estate or interest in possession, reversion, or remainder, as did not pass by his said will, and were not thereby effectually given, or disposed of; but

but if the Court should be of opinion that the devise was not void, then she submitted, whether she was not entitled to have 20,000 *l.* and interest raised and paid to her, by virtue of the trusts of the term of 1000 years, or only 12,000 *l.* and interest, under the trusts of the term of 500 years. And in case the Court should be of opinion that the devise was not void, but took effect, and that she was not entitled to the 20,000 *l.* and interest, she in such case insisted, that 12,000 *l.* together not only with interest from the death of *William Morgan* her brother, but also all such interest as was due and in arrear for the said 12,000 *l.* at his death, and the arrears of maintenance which by the settlement was provided for her from the death of her father, during her minority, and remained unpaid at her said brother's death, ought to be raised and paid to her, by virtue of the trusts of the said term of 500 years; in regard her said brother being tenant in tail in possession of the premises comprised in the said term, he had power by law to bar and destroy the said estate tail, and the remainder or reversion depending or expectant thereon, and having the power and dominion over the same, he was not under any obligation to keep down the interest of the said 12,000 *l.* or her maintenance.

The plaintiffs having afterwards amended their bill, and the appellant *Elizabeth* having intermarried with the appellant *William Jones*, they put in their joint answer to the amended bill; and thereby (amongst other things) said, that the interest of the 12,000 *l.* directed by the settlement to be raised by the trustees of the term of 500 years, computed from the time that the appellant *Elizabeth* attained the age of 21, to the time of the death of her brother, at 4 *per cent. per annum*, amounted to 6369 *l.* 4 *s.* and in a schedule annexed to such answer, they set forth an account of the several sums of money which Mrs. *Jones* after she came of age, had received from her brother and those employed in his affairs.

The respondent the Duke of *Rutland*, by his answer admitted, that the legal interest in the term of 500 years was vested in him as surviving trustee; and Lord *George*, Lord *Frederick*, and Lord *John Cavendish*, by their answer admitted, that the legal interest in the term of 1000 years was vested in them, as the personal representatives of the Marquis of *Hartington*, afterwards Duke of

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of *Devonshire*, who had survived his co-trustees, *Andrew Charlton*, *Thomas Law* and *Edmond Probyn*.

In *October* 1766, and before *Mrs. Jones's* marriage, she exhibited her cross bill against the said *Thomas Morgan* the father, and *Thomas Morgan* the son, and the said *Charles Morgan*, praying, that the right to the said freehold and copyhold or customary estates might be settled and determined, and that the defendants might be compelled to deliver to *Mrs. Jones*, the possession of such of the said estates as did not pass by *Sir William Morgan's* will, and were not thereby effectually disposed of; and that the said defendants, or such of them as had in their hands, custody, or power, any of the Court Rolls, copies of Court Rolls, deeds, evidences or writings which related to such estates, might deliver up the same upon oath; and that the said *Thomas Morgan* the father, might account for the rents and profits of the said estates, since the death of *William Morgan* her brother, and for the money received for timber sold off such estates, and might surrender to the appellant *Elizabeth* the said copyhold or customary lands in the manor of *Peterstone*, and such of the said copyhold or customary messuages, lands and tenements, in the manor of *Bassaleg*, whereof any legal estate was vested in him, and might permit her to be admitted thereto; and in case the Court should be of opinion, that the freehold manors, messuages, lands and hereditaments, mentioned and comprised in the said settlement of the 14th of *May* 1723, passed by *Sir William Morgan's* will, and were thereby effectually given and disposed of to the uses and for the purposes therein mentioned, then that such of the said sums of 20,000*l.* and 12,000*l.* as the appellant *Elizabeth* was entitled to, and all such arrears of maintenance and interest as she had a right to, and then remained due and unpaid, might be raised and paid to her, pursuant to the true intent and meaning of the said settlement.

After the marriage of the appellants this suit was revived, and the defendants having appeared, the said *Thomas Morgan* the elder and his sons put in their joint answer, to the effect of their original bill, and issue was afterwards joined: But before any further proceedings were had, *Thomas Morgan* the father died, having made his will, and thereof appointed *Thomas Morgan* his son sole executor, who proved the same.

On the 8th of *December* 1769, both causes were heard together, before the Lord Chancellor *Camden*; when it was referred to the Master to enquire, whether the testator, Sir *William Morgan*, was, at the time of his marriage, seised of any and what estates whether freehold, copyhold, or customary freehold, in the several counties of *Glamorgan*, *Monmouth* or *Brecon*, and state the same to the Court; and the Master was also to enquire and state particularly to the Court, whether any, and what copyhold or customary freehold estates in the said several counties, or either of them, were surrendered or conveyed after the testator's marriage, to the uses of his marriage settlement, and whether he died seised of any and what estates, either freehold, copyhold or customary freehold, whereof he was seised at the time of his marriage, in those several counties or either of them, without surrendering or conveying the same to the uses of his marriage settlement; and likewise, whether the testator purchased, or acquired any freehold, customary freehold, or copyhold estates after his marriage; and it was further ordered, that the Master should also enquire and state to the Court, the nature and quality of the aforesaid estates, with the course of descent which prevailed, according to the several customs of the customary freehold or copyhold manors whereof the same were held, or were parcel; and the Master was also to enquire, and state to the Court, in which of the aforesaid estates (the subject of the said enquiry) the testator was seised of a legal interest, and in which he was seised only of an equitable interest, and to specify the same; and the consideration of all further directions, and of the costs of the suits, was reserved until the Master should have made his report.

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Several proceedings were had before the Master upon these enquiries, but before the same were gone through, *Thomas Morgan* the son died without issue and unmarried; and he having made his will, and appointed the respondents *Charles Morgan* and *John Morgan* executors thereof, the suit was revived against them.

On the 17th of *March* 1772, the Master made his report, and thereby certified, that Sir *William Morgan* was at the time of his marriage, seised in fee simple of certain freehold estates in the counties of *Monmouth* and *Glamorgan*, and which were con-

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veyed to the uses of his marriage settlement; a particular of which estates, so far as the same had been settled before the Master, was stated in the schedule annexed to his report, and therein distinguished under the head No. 1.—That the testator was at the time of his marriage, and at his death, also seised in fee simple of certain freehold estates in the county of *Brecon*, and which were not included in his marriage settlement, nor afterwards conveyed by him to the uses thereof; a particular of which estates, so far as the same had been settled before him, was stated in the aforesaid schedule, and therein distinguished under the head No. 2.—That the testator was at the time of his marriage, and at his death, equitably entitled to him and his heirs, to the absolute property of certain copyhold or customary freehold estates in the county of *Monmouth*, and which said estates were not surrendered, nor covenanted to be surrendered to the uses of his marriage settlement; a particular of which said copyhold or customary estates, so far as the same had been settled before him, was stated in the aforesaid schedule, and therein distinguished under the head No. 3.—That the testator was at the time of his marriage, and of his death, equitably entitled to him and his heirs, to certain copyhold or customary freehold estates in the county of *Brecon*, and which were not surrendered, to the uses of his marriage settlement; a particular of which estates, so far as the same had been ascertained before him, was stated in the aforesaid schedule, and therein distinguished under the head No. 4.—That the testator was at the time of his marriage, equitably entitled to him and his heirs, to certain copyhold or customary freehold estates in the county of *Monmouth*, and which were surrendered to the uses of his marriage settlement, part in pursuance of the covenant in the said settlement, and part without any such covenant; a particular of which said estates, so far as the same had been ascertained before him, was stated in the aforesaid schedule, and therein distinguished under the head No. 5.—That the testator did after his marriage, purchase certain freehold and copyhold, or customary freehold estates in the counties of *Monmouth* and *Glamorgan*, of which copyhold or customaryhold estates, he had only the equitable interest, the legal interest thereof having been vested in trustees for his benefit; and that at the time of his death, he was seised in fee of such freehold estates, and was equitably entitled, to him and his heirs, to the absolute property of the said copyhold or customary estates; a particular of which said last mentioned freehold

hold and copyhold or customary freehold estates, so far as the same had been ascertained before him, was stated in the aforesaid schedule, and therein distinguished under the head No. 6.

—That the testator was seised of the legal interest of all the said freehold estates, and that he was only seised of or entitled to the equitable interest in the said copyhold or customary estates; the legal interest of the whole of the said copyhold or customary estates, and of such other copyhold or customary estates of which Sir *William Morgan* was seised, or to which he was equitably entitled in the county of *Monmouth*, being in trustees. And the Master further certified, that he had in the said schedule, stated the nature and quality of the aforesaid estates, with the course of descent which prevailed, according to the customs of the customary freehold or copyhold manors, whereof the same were held, and were parcel.

On the 4th of *July* 1772, the causes came on to be heard before the Lord Chancellor *Bathurst*, as well with respect to further directions, as to the matter of costs; when his Lordship ordered, that a case should be made for the opinion of the Judges of the Court of King's Bench, upon the will of Sir *William Morgan*, and that the question should be, "Whether *Thomas Morgan*, the brother of the said testator, and *Thomas Morgan* the younger, and *Charles Morgan*, or any or either of them, took any and what estate in the lands in the counties of *Monmouth* and *Glamorgan*, by the residuary clause in the said will?" And his Lordship reserved the consideration of all further directions, until after the Judges should have made their certificate; and in the mean time by consent, and without prejudice to any question in the causes, it was ordered, that the Duke of *Rutland*, the surviving trustee in the term of 500 years, created by the settlement of the 14th of *May* 1723, should raise by mortgage of the said term, the sum of 12,000 *l.* with interest after the rate of 4 *l.* per cent. per ann. from the 16th of *July* 1763, (being the time of the death of *William Morgan*, the son of the testator Sir *William Morgan*) and by the consent of the appellant *Elizabeth*, present in Court and examined, it was ordered, that the said 12,000 *l.* and interest, when raised, should be paid to Lord *Charles Cavendish*, the surviving trustee named in her marriage articles upon the trusts therein mentioned.

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By a subsequent order of the 14th of *December* 1772, it was ordered, that a sum of 4560*l.* (which it was admitted by the parties, would be due for interest of the 12,000 *l.* on the 16th of *January* then next) should be considered as principal money, to carry interest after the rate of 4*l. per cent.* from that time; and it was further ordered, that the said *Charles Morgan* should pay to Lord *Charles Cavendish*, interest on the said sums of 12,000*l.* and 4560*l.* after the rate of 4*l. per cent.* half yearly, on the 16th of *July* and 16th of *January* in every year, until the said principal sums of 12,000 *l.* and 4560 *l.* should be raised and paid according to the directions of the decree, the first payment of such interest to be made on the 16th of *July* then next.

In pursuance of the order of the 4th of *July* 1772, a case was made for the opinion of the judges of the Court of King's Bench, and the same was argued in *Hilary* Term, 1773, and again in *May* 1773; when the Lord Chief Justice *Mansfield*, Sir *Richard Aston*, and Sir *William Henry Ashurst*, the Judges before whom the case was argued, made the following certificate:

“ Having heard counsel on both sides, and considered this
 “ case, we are of opinion, that the event of a second marriage
 “ was not in the testator's contemplation; but supposing that,
 “ from the generality of the description, the words *any after-born*
 “ *son*, should be extended to the son of any future marriage, we
 “ are of opinion, that from the manifest intent of the testator,
 “ expressly declared in his will, such son must take an estate tail;
 “ consequently we are of opinion, that either way a remainder
 “ after estates tail is devised to *Thomas* the testator's brother,
 “ who by virtue of the said limitation, upon the failure of the
 “ sons of Sir *William* the testator without issue male, was entitled
 “ to the lands in the counties of *Monmouth* and *Glamorgan*, de-
 “ vised by the residuary clause in the said will, for life, with re-
 “ mainder according to the limitations in the said will.”

On the 23d of *July* 1773, the causes were heard upon the Judges certificate, and likewise for further directions, and as to costs; when the Lord Chancellor ordered, that the said certificate should be confirmed, and declared according to the certificate, that *Thomas Morgan* deceased, was entitled to all the lands in

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the counties of *Monmouth* and *Glamorgan* devised by the residuary clause in the will of Sir *William Morgan*, with remainders according to the limitations in the said will, and that the respondent *Charles Morgan* was become entitled to all the estates, late of the said Sir *William Morgan*, in the county of *Brecon*; and ordered, that the appellants should deliver, upon oath, all deeds and writings in their custody or power, relating to the said estates, and also relating to all the estates freehold and copyhold, in the counties of *Monmouth* and *Glamorgan*, which were purchased by Sir *William Morgan*, subsequent to his marriage, to the said *Charles Morgan*, or to whom he should appoint. And as to the ancient copyhold, or customary estates in the county of *Monmouth*, mentioned in the schedule to the Master's report, under the head No. 3. which the testator Sir *William Morgan* was entitled to at and before his marriage, and which were not surrendered, nor covenanted to be surrendered, to the uses of his marriage settlement; his Lordship declared, that the appellant *Elizabeth* was entitled to those estates, and also to such other copyhold, or customaryhold estates, that were under the same predicament; and ordered that it should be referred to the Master, to enquire what other estates were under such predicament; and it was further ordered, that the said *Charles Morgan* should deliver up possession to the appellant *Elizabeth*, of all such copyhold or customary estates under the said head No. 3. as she was so entitled to, or should be found to be entitled to, under the above enquiry; and should also deliver to her, or to her order, upon oath, all deeds, papers, and writings in his custody or power, relating to such estates; and it was further ordered, that the Master should take an account of the rents and profits of such copyhold or customary estates, accrued due since the death of *William Morgan* her brother, received by *Thomas Morgan* the father, and *Thomas Morgan* the son, both deceased, and by the said *Charles Morgan*, and *John Morgan* (executors of the said *Thomas Morgan* the son, who was executor of the said *Thomas Morgan* the father) since their deaths. And the Master was also to enquire, whether any and what timber had been fallen from off the said copyhold or customary estates, since the death of the said *William Morgan* the heir at law, by the said *Thomas Morgan* the father, and *Thomas Morgan* the son, and the said *Charles Morgan*, or any of them, and employed other than in necessary repairs on such copyhold or customary estates, where by cus-

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tom the tenants were entitled to the timber, and the Master was to set a value on such timber as he should find to have been wrongfully employed; and it was further ordered, that what should be found due, on the above account of rents and profits, and also what should be found to be the value of the timber so wrongfully employed by the said *Thomas Morgan* the father, and *Thomas Morgan* the son, or *Charles Morgan*, should be answered by the said *Charles Morgan* and the said *John Morgan* (executors of the said *Thomas Morgan* the son, who was executor of the said *Thomas Morgan* the father) out of their respective assets, in a course of administration; and in case they should not admit assets, they were to come to an account before the Master for their respective personal estates; and it was further ordered, that what should be found due from the said *Charles Morgan*, and the said *John Morgan*, on the said accounts, should be answered by them, and that the same should be paid to the appellants, in right of the appellant *Elizabeth*. And his Lordship declared, that by the true construction of the settlement, of the 14th of *May* 1723, as *William Morgan* the brother of the appellant *Elizabeth* lived to attain the age of 21, she was only entitled to the sum of 12,000*l.* to be raised under the term of 500 years, created by the said settlement; and it was further ordered, that it should be referred to the Master, to take an account of what was due for interest on the said sum of 12,000*l.* from the time the appellant *Elizabeth* attained the age of 21, to the death of her said brother, which happened on the 16th of *July* 1763, after the rate of 4*l.* per cent. per ann.; and the Master was to compute interest on the accumulated sum of 16,560*l.* being the said principal sum of 12,000*l.* and the interest thereof, from the death of the said *William Morgan*, computed to the 16th day of *January* 1773, according to the order of the 14th of *December* 1772, after the like rate of 4*l.* per cent. per ann. and the Master was to make a separate report of such principal and interest: And it was further ordered, that what should be found due for principal and interest, in respect of the said sum of 12,000*l.* should be raised by the Duke of Rutland, the surviving trustee of the term of 500 years, by mortgage of the said term, pursuant to the order of the 4th of *July* 1772; and it was further ordered, that the interest of the said 12,000*l.* due at the time of the death of the said *William Morgan*, and the said sum of 16,560*l.* and interest, when raised, should be according to the said order of the 4th of *July* 1772, paid to Lord

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Charles Cavendish, the surviving trustee in the articles made on the marriage of the appellants, upon the trusts therein mentioned; and upon such payment, it was further ordered, that the said term should be assigned to such person as the said *Charles Morgan* should appoint, in trust to attend the inheritance of the premises; and it was further ordered, that Lord *George*, Lord *Frederick*, and Lord *John Cavendish*, the trustees of the term of 1000 years, created by the said settlement of the 14th of May 1723, should assign or surrender the same, as the said *Charles Morgan* should appoint; and that the plaintiff in the original cause, should pay to the Duke of *Rutland*, Lord *Frederick*, Lord *George*, and Lord *John Cavendish*, their costs of that suit, to be taxed by the Master; and that the plaintiff in the cross cause, should pay to the said Duke of *Rutland*, Lord *Frederick*, Lord *George*, and Lord *John Cavendish*, their costs of that suit, to be taxed by the Master; and as between the respondent *Charles Morgan*, and the appellants, no costs were to be paid on either side; and it was further ordered, that the bills in the original cause and cross cause, as to all other matters, except what were before mentioned, should stand dismissed without costs.

Both parties appealed from this decree; Mr. and Mrs. *Jones* from so much of it as confirmed the Judges certificate, and declared, that *Thomas Morgan* the father, was entitled to all the lands in the counties of *Monmouth* and *Glamorgan*, devised by the residuary clause in Sir *William Morgan*'s will, with remainders according to the limitations in that will; and that *Charles Morgan* was entitled to all the estates of Sir *William Morgan*, in the county of *Brecon*. And *Charles* and *John Morgan* appealed from such part of the decree as declared, that Mrs. *Jones* was entitled to all the ancient copyhold or customary estates in the county of *Monmouth*, mentioned in the schedule to the Master's report, under the head No. 3. which the testator Sir *William Morgan* was entitled to at and before his marriage, and which were not surrendered, or covenanted to be surrendered, to the uses of his marriage settlement, and that she was entitled to all other the copyhold or customary estates which were under the same predicament; and from such part of it, as ordered *Charles Morgan* to deliver possession thereof to Mrs. *Jones*, and all deeds, papers and writings relating thereto; and as directed him and *John Morgan* to account for the rents and profits thereof, and the value of the timber cut therefrom.

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E. Thurlow.
G. Hill.

The argument in support of the original appeal, was divided into two parts. I. As to the lands comprised in Sir *William Morgan's* marriage settlement, and which were decreed to pass to *Thomas Morgan* and his sons, by the residuary devise in Sir *William's* will. II. As to the customary or copyhold estates in the county of *Brecon*.

I. It was said, that the clause in the will by which the testator disposed of the new purchased lands, (these being such as could not be comprised in the marriage settlement) and of the *Brecknockshire* estates, contained a devise of these premises to certain trustees, for that purpose expressly named in the will, upon trust, that they should by mortgage or sale thereof, levy and raise so much money in aid of his personal estate, as should be sufficient to pay his debts and legacies; and then, that they should stand seised of the residue of those premises, to the use (but this was really a trust) of the several persons and for the several estates therein mentioned. This was expressly devising the legal estate to trustees for executory purposes; viz. for paying debts, and then enabling them to make a settlement; which settlement was undoubtedly to be framed and modified, under the directions, and according to the rules of a Court of Equity. But the clause under which the present question arose, concerning the *Monmouthshire* and *Glamorganshire* estates, was of a quite different nature, and was worded and penned in a quite different manner. It began with making no particular disposition of the legal estate on any special trust, but disposed of the whole beneficial interest, without any distinction between legal or equitable estates, for the benefit of the persons therein named. Indeed, the testator in this clause, by way of preamble, begins with saying, that "Forasmuch as it was his intent and meaning, that
" in case his said two sons then living, or any other son or sons
" of him lawfully begotten, thereafter to be born, should die
" without issue male, &c. that then all and singular his ma-
" nors, messuages, &c. in the counties of *Monmouth* and *Gla-*
" *morgan*, not therein before devised, should be devised and
" settled to the uses therein after mentioned; (all this being still
" but a recital of his intention by way of preamble) he there-
" fore declares it to be his will, intent and meaning, (which
" words have an imperative import) that in case his said sons
" *William* and *Edward Morgan*, or any other son or sons of him
" thereafter

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“thereafter to be born as aforesaid, should happen to die re-
 “spectively without any issue male, &c. and in such case, if it
 “should so happen, then (he adds) I give and devise (which
 “words are meant to be operative, and to pass to the devisees
 “what is intended for them) the remainder of all and singular
 “my manors, messuages, &c. in the said counties of *Monmouth*
 “and *Glamorgan*, not herein before devised, and the reversion
 “and reversions, &c. to my brother, &c.” Now it was plain,
 that the words which came subsequent to the word *forasmuch*,
 so far as that part of the clause extended, were used by the tes-
 tator by way of introduction only and as a key whereby to
 open and expound his intention; and the devise itself, under
 which the estate and interest were intended to pass and be trans-
 mitted, stood upon the subsequent or latter part of the same
 clause, which contained the words, *and in case, if it shall so*
happen, then I give and devise, &c. It was here, and here only,
 that the lands in the counties of *Monmouth* and *Glamorgan*, were
 given to the brother *Thomas* and his sons.—Thus much was
 said, to clear the way for finding out the true meaning of the
 testator. Now the subject matter upon which the devise con-
 tained in this clause was to operate, was all the rest and residue
 of all the lands and hereditaments, in the counties of *Monmouth*
 and *Glamorgan*, to which the testator was at that time entitled
 in possession, reversion or remainder; other than those which
 fell within the description of being lands, &c. purchased since
 the marriage, and those customary or copyhold estates in the
 county of *Monmouth*, which the testator directed his son *Edward*
 to surrender to his son *William* and his heirs. But as to the
 lands which had been comprised in the testator’s marriage settle-
 ment, the subject matter of the devise was the ultimate reversion
 in fee of those lands, in which by that settlement there had been
 reserved to the testator an estate for life in possession, with re-
 mainder (subject to a jointure of 2000*l. per ann.* for the wife,
 and portions for younger children) to the first and other sons of
 the marriage, successively in tail male. Immediately after the mar-
 riage, this ultimate reversion in fee became a fixed, certain and
 settled estate, divided from the possession, and capable of being
 devised, transferred, aliened, settled, conveyed and disposed of,
 like any other kind of real property in lands; but it was neces-
 sary that every such conveyance, devise, transfer, alienation and

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disposition, should be framed according to the established forms and rules of law. Here the testator had attempted by his will, to make a disposition of this reversion in fee in these premises; but then that disposition was conceived in words which sounded *futurely*, and declared that it should not take effect otherwise than upon the happening of certain contingencies therein specified; viz. the events of certain persons dying without issue male.

Now every limitation, either by grant or devise, of any estate or interest in lands, to take effect *in futuro*, must be so penned as to be made to pass either by way of *express remainder*, or by way of *future* or *springing use*, or *trust*, or by way of *executory devise*.

As a reversion or remainder in fee, where it is subsisting and vested under some prior settlement or other act, is a fixed and settled interest, it must be transferred, aliened, and disposed of much in the same way as lands in possession; and though such reversion wears the aspect of being an interest or estate to commence *futurely*, yet in fact it is a *present* and actual interest; as appears from the old law, which made the attornment of the tenant in possession, a necessary circumstance to render the grant of the reversion valid and effectual. In limiting remainders by grant or devise of lands, no grant or devise of such remainders can be good, unless there is a precedent particular estate capable of supporting such a remainder, and unless the remainder is created at the same time with such particular estate. It is the same with respect to reversions. For it has been held, that where a reversion in fee, expectant upon the determination of several precedent estates of inheritance, was granted by lease and release, *habendum* to the releasees and their heirs, *from and after the determination of the several precedent uses and estates*, such *habendum* will be too remote; and that the law will not suspend such reversion from taking effect, for so long a time as during the continuance of the several precedent estates, where some of them are estates of inheritance; there cannot therefore be a remainder created of a reversion in fee, without a precedent particular estate created of that reversion, capable of supporting it, and without such remainder being created at the same time with that particular estate. Now here, the testator, without limiting any precedent particular estate to any person certain, put
off

off or prolonged the vesting of this reversion, to a remote or distant day; for his words were, "In case my said two sons now living, or any other son or sons of mine lawfully begotten, hereafter to be born, shall die without issue male, &c. and in such case if it shall so happen, I give and devise the remainder of all, &c. to my brother *Thomas Morgan*, for his life, &c." Now these words vest no present estate at all in any person certain; they say indeed, that in case all the testator's sons, born or to be born, shall die without issue male, the brother *Thomas* and his sons shall have the lands; but who shall have them in the mean time? If the testator has omitted to ascertain who shall be the immediate taker, here will be a remainder created without a particular estate; which if the old rules of law are to be adhered to, will be an incurable defect, and it will not be possible to support this limitation by way of remainder.

The other way of giving legal effect to the disposition made by this clause of this reversion in fee, is to consider it as an *executory devise*, where no precedent particular estate is required to support it. It is sufficient, though it be a future devise, if the future estate thereby given, is made to take effect within the compass of a life or lives in being, and the space of 21 years afterwards; for this period of time, the law will permit landed property to be unalienable; but if the devise be not made to take effect till a general failure of issue of any person or persons, there the law will not permit such landed property to be withheld for so long, because a failure of issue may not happen till after the 10th, 12th or 20th generation, or even till later.

It might be said, that there is a way of making good this devise of the reversion in fee, by way of *remainder*; if we suppose that there are precedent particular estates of inheritance necessarily implied in the devise, which may operate as particular estates for supporting it by way of remainder; *i. e.* that all future sons of the testator by any after-taken wife, should necessarily take estates tail after those limited by the marriage settlement, precedent to the taking effect of the remainder, to the brother *Thomas* and his sons.

But it was insisted, that the admitting such an implication was contrary to the most established rules and maxims. If there

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is a devise to *A.B.* indefinitely, or to *A.B.* for life expressly, and then follow in the same instrument, words which say, that if the said *A. B.* dies without issue of his body, the lands shall go over to *J. S.* there *A. B.* the first devisee, shall take an estate tail by necessary implication, because in both cases he has a precedent estate for life, and then the subsequent words enlarge that estate to an estate tail; but if there are no other words in a devise, save only, that if *A. B.* a stranger, dies without issue of his body, *J. S.* shall have the lands, there *A. B.* shall take nothing at all by the devise; for the will carries no expression from whence necessarily to infer, that *A. B.* shall take any estate or interest in the land whatsoever; and then this is a devise after a general failure of issue of a stranger, which cannot be made good either by way of remainder, or executory devise, and so it is void. Admit, for argument sake, that where *A.* is under a former settlement tenant in tail, with remainder to *B.* in tail, with remainder to *C.* in tail, with the ultimate reversion in fee to the said *A.* there if *A.* devises, that in case neither he himself, nor *B.* nor *C.* shall have any issue male, the land shall go over to *J. S.* and his heirs, this will be a devise of the reversion upon the failure of issue male of the testator, and of *B.* and *C.* Be it so; this will not warrant the going further and asserting, that if in this case *A.* the testator should devise, that if he himself, and the said *B.* and *C.* and likewise *D.* and *E.* two strangers, should all die without issue male, then the lands should go over to *J. S.* and his heirs, that would give estates tail by implication to *D.* and *E.* the words "if *D.* and *E.* die without issue," only denote the event upon which *J. S.* is to have the lands, and if you go farther and say, that they tacitly imply that *D.* and *E.* are first to have estates tail in the lands, it is contrary to all the rules; which expressly say, that under the bare words, if such a one and such a one, being strangers, shall die without issue, any one else shall have the lands, no estate at all shall arise by implication to the person whose issue is so supposed to fail; there must be some precedent estate capable of being enlarged, otherwise these words will give nothing at all to such strangers.— In the present case, the words were as general as any words under any supposition could possibly be, "In case my said two sons
" now living, or any other son or sons of mine, lawfully begotten,
" hereafter to be born, shall die without issue male, &c. then
" and in such case, if it shall so happen, I give and devise the

“the remainder of all, &c. to my brother *Thomas Morgan* for
“his life, &c.”

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Great abilities however, and great fertility of invention might say, that this testator had not the sons of any future marriage in contemplation; which was in a manner to say, that he had only in contemplation the sons he had already by Lady *Rachael*, or should hereafter have by her. But where was there one syllable in this will, which so far abridged the expression, *any son or sons of mine hereafter to be born*, as to make it mean only son or sons of the testator thereafter to be born by Lady *Rachael*? Let every clause, let every sentence, let every word, let every syllable of this will be scanned and examined with the most minute and critical attention, nay, let them be warped into every shape, and tortured in every mode that could be thought of, it would not be possible to find any thing which could favour such an exposition. But the words are, “any other son or sons of mine hereafter to be born *as aforesaid*.” And how was it before said, that the sons of whom it was predicated before, were to be begotten? Why, it was predicated of those sons, that they were to be *lawfully* begotten. It was natural that the testator should exclude all sons who were not born in lawful wedlock, and therefore he could mean to introduce by the words *as aforesaid*, nothing else than *lawfully begotten*.

But it is said, that he made his wife guardian of his children after his death, and therefore could have no thoughts of surviving her, so as to marry a second wife; and he knew he was a dying man, for he died in three weeks after the date of his will.

True: He did make his wife, with four other persons in whom he had confidence, guardians of his children. A guardianship is an authority coupled with an interest, and will therefore survive. The devise therefore amounted to this, that he thereby directed, that the wife and the said four other persons, or the survivors or survivor of them, should be the guardians of his children, but it no where necessarily imported that his wife should be one of those survivors; he must know that she had the same chance of dying in his lifetime, as any other of her co-guardians had; and if she had died either in the lifetime of

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the testator, or of any of the other guardians, the appointment would have stood good to the others, and the guardianship surviving, the children would have been properly taken care of; so that the inference from this circumstance, of appointing the wife a co-guardian with other persons, afforded not the least argument for what it was adduced to prove. Then as to the testator's being conscious that he was a dying man: What place was there in the will, from whence it could be made apparent that he had this consciousness? Or from whence did it appear that he had the least impression upon his mind, that he was a dying man? He did not in any part of his will say, that he was languishing in his health, or that he was infirm in his body; on the contrary he said, that he was of sound mind, memory and understanding; for a perfect sanity, a firm soundness of mind, it is commonly understood that there must be *mens sana in corpore sano*; and here, as conscious as he might be of approaching death, he supposed that he might live to see some of his four children, all then infants under six years of age, attain the age of 21; for in the appointment so made by him of guardians to his children, he said he appointed those persons guardians *of such and so many of his children, as should be under age at the time of his death*; which undeniably supposed, that he thought it possible at that very time, to live till some of his children should attain that age; thus looking forward, as it were, to a period of 14 or 15 years at the very least.

It is still further objected, that the brother *Thomas Morgan* was not by the will to take these estates, otherwise than subject to the provisos contained in the marriage settlement of 1723; therefore by the words, *any other son or sons of mine hereafter to be born*, the testator must mean nothing but the son or sons of him by *Lady Rachael*, who were to be takers by that settlement.

But here is a conclusion not contained in the premises, and here are premises which do not warrant the conclusion. *Thomas*, the brother was to take the lands in reversion, which were comprised in the settlement of 1723, subject to the provisos and payments directed or contained in that settlement; but not under or by virtue of the uses or limitations therein contained. If *Lady Rachael* survived the testator, *Thomas* the brother was to take

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take the lands subject to her jointure, and to the powers of distress and entry thereby given for recovery thereof; and subject also to the payment of the maintenance and portions by that settlement provided for the younger children, so far as either the jointure or portions should be demandable. Did that necessarily imply, that Lady *Rachael* should survive the testator? No; no more than it necessarily implied, that the younger children should die before their portions should be demandable. In fact two of the younger children were dead, and by their deaths the portions were in part discharged: But would the respondents say, that they took these estates subject to such part of the portions as was so discharged? No; so much was sunk. And if Lady *Rachael* had died before the testator, would not her jointure have sunk in the same manner? There was therefore nothing in these words which necessarily imported, that the testator conceived he was to die in the lifetime of Lady *Rachael*; and that the words, *any other son or sons of mine hereafter to be born*, necessarily meant future sons by Lady *Rachael*, and by her only; they were clearly and manifestly applicable to every son, and all sons of the testator by any wife whatsoever.

II. As to the customary or copyhold estates, it was said to be observable, that the testator made no express mention either of customary or copyhold estates, but only in two clauses of his will; viz. in that clause whereby he made a general devise to his trustees, of the lands in the counties of *Monmouth* and *Glamorgan*, purchased since his marriage; and in that other clause, where he directed his youngest son to surrender his right, title and interest in his customary or copyhold estate in *Monmouthshire*, to the use of his eldest son, his heirs and assigns. The first of these clauses was expressly confined to copyholds purchased after the marriage; and in the latter, the copyholds were evidently introduced only to make a compleat disposition of them to the eldest son; for without such a direction, they would have descended, some of them wholly, and the rest of them, as to a moiety, to the youngest son in fee; the ancient copyholds in *Monmouthshire*, being the greater part of the custom of *borough English*, and the rest of the custom of *gavelkind*. Now the ancient family copyholds in the county of *Brecon* were descendible to the heir at common law; it was not therefore necessary to take any notice at all of them in the will, in order to pass them to

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to the eldest son, as they would of course descend to him in fee, if unnoticed in the will; but the testator having expressly mentioned his copyhold estates, only where it appeared that he intended to dispose of them otherwise than they would have gone in a course of descent, it was apprehended, that where he made no express mention of copyholds, he did not intend to take them out of their course of descent. This was the case with respect to the ancient family copyholds in the county of *Brecon*, which, as the testator took no express notice of in the general devise to the trustees, it was submitted, did not pass to them by the general words of that devise, but were intended to be left to descend to the heir at law. And this would appear still more evident by observing, that in the clause whereby the estates in the county of *Brecon* were devised to trustees, the testator used these words, *equity of redemption of all and singular the said premises*; now none of these family copyholds were then in mortgage, and consequently, the words *equity of redemption*, could not be applicable to them.

A. Wedderburn.
J. Dunning.

On behalf of the respondents it was said, that the point of greatest value in the cause, was that which the appellants Mr. and Mrs. *Jones* had brought in question by their appeal, respecting the settlement intended to be made by the will, of the reversion of the estates settled by Sir *William Morgan* to the uses in his marriage settlement; viz. whether the limitations in the residuary clause of his will, in favour of his brother *Thomas Morgan*, and his sons successively, and their issue, were well created? The respondents were in possession of the unanimous opinion of the judges of the King's Bench, and of the Lord Chancellor, that these limitations were good; and it was conceived, that this opinion was well founded. When Sir *William Morgan* made his will, he was seised in fee of the reversion of all these estates, subject to the uses created by his marriage settlement. It had not been, nor could be doubted, but that he might have limited that reversion in fee to his brother and his sons and their issue, for such estates as were mentioned in the will; and as little could it be doubted, but that he meant so to limit it; for that was apparently a main object of his will. He was capable of devising; the property was subject to a disposition by devise; he had expressed his intention to devise; and the parties to whom he meant to devise, were capable of taking.

But still it was said, that the limitations in the will could not take place, because they were introduced by the following words: *In case my said two sons now living, or any other son or sons of mine lawfully begotten, hereafter to be born, shall die without issue male of their bodies, or the body of some or one of them, lawfully to be begotten; after their decease without issue male, &c.* That these words postponed the time for the limitations in the residuary clause to take effect, till a general failure of issue of Sir *William Morgan*, as well by any after-taken wife, as by his then Lady; and that the children which he might have by any after-taken wife, not being provided for by the settlement, the limitations in question could only take effect as executory devises; and that as such they would be too remote, being after a failure of issue generally.

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To this it was answered, that these limitations did not take effect as executory devises, but as immediate devises of the reversion in fee, subject to the estates created by the settlement. It certainly would be so, according to Lord *Holt's* opinion in *Badger v. Lloyd**, unless the will postponed these limitations to failure of issue of Sir *William* by a second marriage. The question then arose, had he a second marriage in view? The will was made in the same month in which he died, probably when he lay on his death-bed, within eight years after his marriage, when he had four children living by Lady *Rachael*, and it was not improbable that she might be then with child. By this will, he gave some specific things to Lady *Rachael*, and named her one of his executors, and one of the guardians of such and so many of his children, as should be under age at the time of his death, and she in fact survived him. These observations, drawn from the will, destroyed every presumption that Sir *William* had in view a future marriage, or any children not provided for by his settlement. The will was adapted to the then circumstances of his family; he had such and only such children in view, as Lady *Rachael* might be guardian to; if the situation of his family had varied, the will was subject to his controul, and would have been varied also; he knew that the issue male of his marriage was provided for by the settlement, and the objects to whom he destined his large and ancient family estate, in failure of the issue male then provided for, were his brother and his sons, who would then become the male heirs of his name and blood. If he had

* 1 Salk. 232.
1 Lord Raym.
523.

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happened to outlive Lady *Rachael*, and had married again and had issue, such subsequent marriage, and having issue, would have revoked the will; consequently, the children of any future marriage would not have been disinherited.

But supposing, that upon the fair construction of this will, it should be taken, that the residuary devise was postponed till failure of children by a future marriage; still it might well take place as a disposition of the reversion, by raising implied limitations in favour of his children, and their issue male; for that estates may be raised by implication as well as by express words, cannot be denied. As to other parts of Sir *William's* property, not included in the settlement, but disposed of by the will, he limited the same to his sons and their issue male successively; and in failure thereof, to his brother *Thomas Morgan* and his sons, and their issue male: And these dispositions shewed, that the family of his brother were the objects he meant to provide for, in default of his own issue male. The powers of jointuring, portioning younger children, and leasing, extended to the testator's sons then born, and his after-born sons; and shewed conclusively, either that the sons of his then marriage were the only sons he had in view, or that he meant to give estates tail by implication to the sons of a future marriage; for if the sons to whose estates he postponed the limitations to his brother and his issue male, were not the sons provided for by the settlement, or sons meant to take particular estates under the will, all these powers were nugatory; as sons taking neither by the settlement or the will must have taken the fee simple, and therefore wanted no such powers. He had given estates tail by the settlement, to the sons of that marriage; if he had in prospect sons of another marriage, he meant the like interest for them. It is not new to construe one part of a will by another; and *nascitur ex sociis*, is a rule of construction approved of, and used by Lord Chief Justice *Hale*.

The authority relied upon by the appellants, on this part of the case, was that of Lady *Laneborough v. Fox**; but it was conceived that the present case was different. In that case, by the settlement of 1676, *James Lane* had an express estate for 99 years limited to him, with remainder to the use of the heirs male of his body: By the will, on failure of issue of the body

**Vid.* Vol. IV.
p. 96.

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body of *James Lane*, and for want of heirs male of the testator, the limitation was to his daughter *Frances Lane*: The opinion of the judges as delivered was, "That Lord *James* had "by the settlement but an estate for 99 years, and that he took no "other estate by the will; neither was his estate for 99 years "any ways enlarged by that will; and that as it did appear by the "express words of the devise, that the testator did not mean "that *Frances's* interest should commence in point of time, till "after the failure of issue of the body of Lord *James*, &c. it "was a void devise of the reversion to her, because it was future and too remote." There, by the settlement, the estate of *James* was a chattel interest only for 99 years; an express limitation in the will to his issue, or the heirs of his body, would not have enlarged that estate for years to an estate tail; and if it could not have been done by express words, certainly it could not by implication: The judges therefore went on the clearest grounds, when they delivered it as law to the Lords, that Lord *James's* estate for 99 years, was not enlarged by the words of the will. For the words of the will could not operate to give by implication a different estate, from that carved out by the settlement; and no intention appeared, to give estates to the heirs general of *James*, as purchasers; and therefore as they could not take, it was of consequence that *Frances*, if she took at all, must take by way of executory devise; and as an executory devise the estate was too remote. But the limitations in favour of *Thomas Morgan* and his sons, and their issue male, might take effect, by considering the will as having two contingencies in prospect; if the testator should have children by an after-taken wife, the estate should go to those children; but if he should not have such children, then the limitations to his brother and sons should take effect; and the first of these contingencies not having happened, nothing stood in the way of the second.

As to the other point made by Mr. and Mrs. *Jones*, touching the copyhold and customary estates in the county of *Brecon*, it was said, that the presumption is, that a man when making his will, does not mean to die intestate as to any part of his property: But in this case, the respondent stood in need of no presumption, as the words were comprehensive enough to include this property; and the appellants could only found their hopes of success, in the words being narrowed from their general import, by the construction

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construction attempted to be put upon them. The words are, *all my manors, royalties, messuages, farms, lands, tenements and hereditaments whatsoever, situate and being within the county of Brecon.* These words certainly comprehended this disputed property; but if they were less clear, the more reasonable presumption would be, that this property was included; because it lay in the manor of *Brecon*, of which the testator was lord, and which undoubtedly passed by this devise, and was intermixed with the antient possessions of the family.

In support of the cross appeal, which related to the lands mentioned in the Master's report under the head No. 3. it was said, that the testator was equitably seised of these estates, and therefore there was no occasion to surrender them to the use of his will; and if it appeared from the will, to have been his intention that they should pass, no matter of form stood in the way, to prevent that intention from taking place. That these lands lay intermixed with the settled estate, and part of the park at *Tredegar*, the mansion of this ancient family, made part of them; it was not therefore probable, that the testator intended to disunite these parcels from the settled estate; and it was presumed, that the words in the residuary clause, *all and singular my messuages, manors, royalties, advowsons, parks, lands, tenements, and hereditaments whatsoever and wheresoever, in the said counties, &c.* were extensive enough to include these parcels of property. But it was said, that these words were qualified by the parenthesis (*not herein before devised*), and that these lands were before devised by the clause in the will which directed, that the youngest son *Edward Morgan* should surrender them to his eldest brother, his heirs and assigns. In answer to this observation, it was sufficient to say, that these words referred to the estates actually before devised, and would admit of no other reasonable construction. The directions to his son *Edward*, to surrender to the use of his son *William*, gave no estate, and were not properly a devise, for *Edward* was only to surrender such estates as he should have competent interest in, to enable him to surrender, and which he did not take by the will; but these equitable copyholds he could not surrender. In fact it appeared by the proceedings in the cause, that there were some copyholds of *gavelkind* tenure in the manor of *Bassaleg*, in which the testator had a legal interest, upon which the direction to *Edward* might operate, and no other could

could be presumed. The words were, *that I shall die seised of.* To such as he then had, or should acquire the legal interest in, and should die seised of, the direction given to *Edward* to surrender was proper; but was totally inapplicable to the lands in question, wherein the testator had only an equitable interest.

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To these arguments it was answered, on the part of the original appellants, that the testator was really and truly the proprietor of these lands; but he probably did not know that the circumstance of the legal estate being outstanding in trustees, gave him an equitable power of disposing of them by will, without previously procuring any surrender of them. It is a point of law, of which many people, and even some lawyers, may be supposed to be ignorant. His father *John* seemed to have been in the same ignorance; and he, to invest the property of these copyholds in his eldest son *Sir William*, devised that his youngest son *Thomas* should surrender them to his eldest son *Sir William* in fee, and as a remuneration for the compliance with that direction, he gave him the *Ruperra* estate, in *Glamorganshire*. *Sir William* in his will, pretty nearly followed the example which his father had set him; and devised, that when his youngest son *Edward* should come of age, he should pass and surrender all his right title and interest in the customary and copyhold estates in *Monmouthshire*, to the use of his eldest son *William*, his heirs and assigns for ever. He did not direct, that *Edward* should surrender them to *William* for life, and then to his first and other sons successively in tail male, with remainder to him, *Edward* for life, remainder to his first and other sons successively in tail male, with remainder to all and every the after-born sons of the testator; but his direction was, that *Edward* should pass and surrender his right and interest in these copyhold premises, to *William* and his heirs for ever, for an absolute estate of inheritance, beyond which there could be no ulterior remainder. Here was therefore a plain indication from the testator, by express words, that his son *William* should have these lands in full propriety, and as absolute owner of them, and this would amount to a devise, and transmit the fee and inheritance to *William*; and as *Edward* died in the lifetime of *William*, under age, and *William* after attaining his age never made any will, the whole estate and interest in these premises must necessarily fall by descent to his sister, who was his heir at law.

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But suppose that by *Edward's* dying before he attained 21, and before his becoming capable to make any formal surrender of these premises to his brother, even in conjunction with the trustees, the testator's direction to surrender was incapable of taking any effect at all; yet that could give no kind of right in these lands to *Thomas Morgan* or his sons, who were not so much as once spoken of in the will, with regard to them. If the will was not operative enough to give these premises to *William* the eldest son, it must leave them to descend according to the due course of law, and the testator must be considered as being dead intestate, with respect to these copyholds; and the custom being *lex loci*, *William* would have one half of the *gavelkind* land in fee, and *Edward* would have all the *borough English* land to himself in fee, and also the other moiety of the *gavelkind* land; for the equitable estate, in point of descent, was governable by the custom as much as the legal, *equitas sequitur legem*. This being so, when *Edward* died, his equitable interest in all his *borough English* land, and also in his moiety of the *gavelkind* land, must necessarily devolve upon his brother *William*, as his heir, he being his only brother; and if there had been more, the descent among collaterals of *borough English* land is not to the youngest, but to the heir at common law; and when *William* also died without making any will, his heir was necessarily *Mrs. Jones*, his sister. Thus there was not the least pretence for introducing *Mr. Thomas Morgan* the uncle, or any of his sons, into any present or future estate or interest in these copyholds, but they clearly belonged to *Mrs. Jones*.

DECREE
affirmed.
M. S. Jour.
sub anno 1774.
p. 623.

After hearing counsel on these appeals, the following question was put to the Judges, viz. "Whether *Thomas Morgan*, the brother of the testator, and *Thomas Morgan* the younger, and *Charles Morgan*, or any or either of them, took any and what estate in the lands in the counties of *Monmouth* and *Glamorgan*, by the residuary clause in the will?" Whereupon, the Lord Chief Justice of the Common Pleas delivered the unanimous opinion of the Judges, "That *Thomas Morgan* the brother, took an estate for life, in the estates in *Monmouthshire* and *Glamorganshire*, with remainder to trustees to preserve contingent remainders, with a remainder to *Thomas Morgan* the younger, for his life, with remainder to trustees to preserve contingent remainders, with remainder to his first and every

“every other son in tail male; with remainder to *Charles Morgan*, as being the second son of *Thomas Morgan* the brother, “in tail male.” It was therefore ORDERED and ADJUDGED, that the original appeal should be dismissed; and so much of the decree as was therein complained of, affirmed: And it was further ORDERED and ADJUDGED, that the cross appeal should also be dismissed; and so much of the decree as was therein complained of, affirmed.

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Joseph, Lord Milton, - - Appellant. Case 14.
Moore Edgworth, and others, - Respondents.
 2d May, 1774.

IN consequence of the determination of the former appeal in this cause*, the appellant prepared for the trial of the issue, which was to have been tried at the Summer Assizes of 1773, held at *Clonmell*, for the county of *Tipperary*; but on the 13th of July 1773, a few days before the Assizes were to have been held, the respondents moved the Court, and upon reading the affidavits of the respondent *Damer Edgworth*, in support of the motion, and of *William Lane* against it, it was ordered that the issue directed in the cause, should be tried in the county of the city of *Dublin*, by a jury of the said county; although Mr. Baron *Power* declared himself to be of a contrary opinion.

* Vol. VI.
 P. 588.

The substance of the affidavit made in support of this motion, was, that the lands in question lay in the counties of *Meath*, *Westmeath* and *Kildare*; that the appellant had a large estate and property in the county of *Tipperary*, and several incumbrances affecting many estates there, and by that means had a very powerful interest and influence in that county, so that the respondents could not expect a fair trial; that on account of the distance of *Clonmell*, the ages and infirmities of their witnesses, and the expence of producing them there, the respondents were unable to support that expence; that the principal gentlemen

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men at the bar were retained for the appellant; and that the respondents were not able to fee counsel who did not go that circuit.

This affidavit was answered by the affidavit of the appellant's Solicitor, Mr. *Lane*, who deposed, that to his knowledge and belief, the appellant was not related to, or connected with any considerable family in the county of *Tipperary*, and that his connections with any family in that county, gave him no influence therein; that the appellant had no incumbrances upon or affecting any estates in *Tipperary*, exceeding the amount of 3,200 *l.* due to him on judgments; that the respondents might expect to have, and would have as fair and equal a trial in that county, as in any county in this kingdom; that he had retained only three lawyers as counsel for the appellant, upon the trial of the issue; and that the respondents had the choice of thirty more at least, most of whom were deemed gentlemen of ability.

A. Wedderburn.
J. Madocks.

The appellant apprehending this order to be exceedingly erroneous, appealed from it; and on his behalf it was insisted, that the decree of the 25th of *November* 1771, having been affirmed by the House of Lords, with only an addition, became a decree of that House; and consequently, the Court of Exchequer had no right afterwards, to make any alteration therein. That if the respondents had been dissatisfied with that part of the decree which directed the issue to be tried at *Clonmell* Assizes, they ought to have appealed from it; and not have rested till a very short time before the issue was to have been tried there. But if the Court of Exchequer had any authority to vary the decree after its having been so affirmed, which it was contended they had not; yet there was no sufficient ground or reason laid before them, for directing the issue to be tried in the county of the city of *Dublin*, and by a jury of that county. But it surely ought to be tried in the county of *Tipperary*, where the conversation happened which was the foundation of its being originally directed.

ORDER
reversed.
M. S. Jour.
sub anno 1774.
p. 647.

On the day appointed for hearing this appeal, counsel appeared and were heard for the appellant; but no counsel appearing on behalf of the respondents, it was ORDERED and ADJUDGED,

JUDGED, that the order complained of should be reversed; and that the issue before directed to be tried, should be tried by a jury of the county of *Tipperary*, at the next assizes to be held at *Clonmell*, in and for the said county.

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Elizabeth Darley, Widow, - Appellant. Case 15.
George Vincent Langworthy, - Respondent.

10th June, 1774.

VINCENT DARLEY being seised and possessed of considerable real, leasehold, and other personal estates, made his will, dated the 10th of *October* 1759, and thereby after bequeathing many pecuniary legacies and annuities, he gave and devised all his real estates, in the counties of *Devon* and *Cornwall*, (in case he should leave no issue at his death) to the respondent, the son of his sister *Essex Langworthy* for life, with remainder to his first and other sons in tail male; remainder to the next and other sons of his said sister *Essex Langworthy* in like manner, with remainder to his own right heirs. But nevertheless, the testator declared his will to be, that his dear wife *Elizabeth*, the appellant, should have, hold, receive and keep the rents and profits of his said lands, for her own use, during her natural life, and that the same should be subject to the incumbrances that he had laid thereon. And reciting, that he was entitled to a messuage or tenement called *Bonds Walls*, lying contiguous and adjoining to his estate called *Battens*, for the remainder of a term of 900 years, or some such long term; he by his said will, ordered and directed his trustees and executors therein named, to grant and assign the same tenement unto some person or persons in trust, if it could or might be done by any ways or means whatsoever, that the same might go unto and always during the remainder of the said term be enjoyed by the owner or possessor of *Battens* for the time being, and not to be separated therefrom, as long as the said term should last. And the testator gave to his said wife the appellant, the rents, issues and profits of all his chattel estates for so many years as she should live, if the terms therein so long continued,

3 Wilfon's
Rep. p. 6.
under the
name of Dar-
ley v. Dar-
ley.

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and she should choose to reside at *Battens* aforesaid. And he also gave to his wife, and *Richard Welsh*, all the rest of his goods, chattels and personal estate, after payment of his debts, legacies, and funeral expences; and made them executors of his will, in trust for his said nephew the respondent, when he should arrive at his age of 21, or be married within that time, and should leave a child or children to enjoy the same. But it was his will, that his wife should have and enjoy, during her life, the use of all the household goods, plate and furniture at *Battens*, and the stock on the premises both quick and dead.

The testator died on the 8th of *February*, 1764, leaving the appellant his widow; and *Theodore Darley* his brother and heir at law.

The said *Theodore Darley*, in the year 1765, filed his bill in the Court of Chancery against the appellant, and the respondent and others; stating, that he was the brother and heir at law of the testator, and also stating the testator's will, and that the testator had, after making such will, viz. in *Michaelmas* Term 1763, suffered a common recovery of several parts of the estates and premises thereby devised, and by proper deeds and conveyances declared the uses of such recovery to himself in fee. That the testator died without republishing his will, or making any other will, leaving the said *Theodore Darley* his brother and heir at law. He therefore insisted, that as the recovery was suffered by the testator long after the making of his will, and as the testator did not republish the same, or make any other will of the said estates, after suffering such recovery, the will was thereby revoked, with respect to any devise therein made of any of the premises included in the recovery; and that upon the death of the testator, the estates comprised in the recovery descended to the said *Theodore Darley*, as the testator's heir at law; and therefore the bill prayed, that the possession of the testator's real estates might be delivered up to him; and for an account of the rents and profits thereof, from the death of the testator; and also an account of the rents and profits of the tenement called *Bonds Walls*, from the testator's death; and that the term of years therein might be assigned to some person in trust for *Theodore Darley*; and also for an account of the timber cut down from the premises, and that the possession of such of the testator's copyhold estates as belonged

belonged to *Theodore Darley*, might be delivered up to him, and the rents and profits thereof accounted for.

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The appellant, and the several other defendants put in their answers to this bill, and admitted the several facts therein stated.

On the 10th of *December* 1766, the cause was heard before the Lord Chancellor *Camden*, when his Lordship ordered a case to be stated for the opinion of the Court of Common Pleas, upon the following question; *viz.* "Whether the deed executed, and the recovery suffered by *Vincent Darley*, was a revocation of the will?" And on the 7th of *July* 1767, the judges of that Court certified, that they were of opinion, that the deeds executed and recovery suffered by the testator *Vincent Darley*, were a revocation of his will, as to the lands comprised in the recovery.

In consequence of this certificate, the cause was further heard, on the 21st of *November* 1767; when his Lordship was pleased to declare, that the testator having suffered a recovery after the execution of his will, the same was thereby revoked, as to the devises of the real estates comprised in the recovery; and that the said estates were descended to the said *Theodore Darley* the testator's heir at law. And it was ordered, that an account should be taken of the rents and profits thereof, received by the appellant, or for her use; and that what should be found due on that account, should be paid by the appellant to the said *Theodore Darley*, and that possession thereof, and of the deeds and writings thereto belonging, should be delivered up to him; and his Lordship declared, that the testator having so revoked *in toto* the disposition of his freehold estate called *Battens*, the direction by him to convey his leasehold estate called *Bonds Walls*, for the benefit of those persons to whom he had devised the said estate called *Battens*, was consequentially revoked also, and that the same fell into the residue of his personal estate. And with respect to the testator's personal estate, his Lordship declared the devises by the will to the appellant, of all his chattel estate, in case she chose to reside at *Battens*, and the use of his household goods, plate and furniture at *Battens*, and his live and dead stock, were become consequentially revoked by the revocation of the devise of his estate at *Battens*, and that the same fell into the residue of his personal

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personal estate. And the testator having devised the residue of his personal estate to the respondent, under certain contingencies; his Lordship declared, that the testator's next of kin would be entitled to such residue, if those contingencies should not happen. And it was further ordered, that the Master should take an account of the personal estate of the testator, received by the appellant, or for her use; and that she should sell the testator's household goods, linen, plate and furniture, together with the stock; and that the testator's personal estate should be applied in payment of his debts in a course of administration, and then of his legacies; and that the residue thereof should be paid into the Bank, to the credit of the cause, subject to the contingencies in the testator's will; and any of the parties who should be entitled to the clear residue of such personal estate, upon the contingencies in the will mentioned, should be at liberty to apply to the Court touching the same.

The appellant being dissatisfied with this decree, for having declared, that the bequest of the use of the testator's household goods, plate and furniture at *Battens*, and his live and dead stock to the appellant, was consequentially revoked by the revocation of the devise of his estate at *Battens*, and that the same fell into the residue of the personal estate; and also for having declared, that the leasehold estate called *Bonds Walls*, and all the other chattel estates, fell into the residue of the testator's personal estate; petitioned for a rehearing of the cause, as to those matters. And accordingly, the cause was reheard on the 29th of *April* 1769, when his Lordship was pleased to affirm the former decree.

A. Wedderburn.
J. Madocks.
J. Lloyd.

The appellant therefore appealed from both the decrees; insisting, that as to *Bonds Walls*, the question was, whether the implied revocation of the devise of *Battens*, by the testator's recovery suffered after his will, should operate as a revocation of the bequest of *Bonds Walls*. The devise of *Battens* was to the wife for life, with several remainders over; and the testator directed, that *Bonds Walls* should be assigned, so that the same might be enjoyed by the owner and possessor of *Battens* for the time being, and not be separated therefrom, as long as the term should last. The owner and possessor of *Battens*, meant the person who should take *Battens* under the will, and could have

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no other reference; and the wife being the first devisee of *Battens*, the words of the will, as they stood, had the same effect, as if the testator had expressly bequeathed *Bonds Walls* to his wife for life, together with *Battens*: So that *Battens* and *Bonds Walls* were united in one devise to the same person. That *express* and *implied* revocations are both founded, or supposed to be founded, in the *intent* of the testator; the first in his *declared* intent, and the latter in his *presumed* intent, and either way a testator may revoke part of the thing devised, or part of the estate or interest devised, and where part only is revoked, the residue remains unrevoked. An entire farm may be devised; the devise as to a part may be revoked, and the rest remain. If an estate in fee in possession be devised, a lease for years made after the will, is only a revocation *pro tanto*, at law. If an estate in fee be devised, and a mortgage in fee afterwards made, at law it is a revocation *in toto*, in equity a revocation *pro tanto* only. And these instances shew, that the effect of a revocation shall no farther break in upon the testator's original intention, than is necessary to carry the second intent into execution. In the present case, the testator gave both *Battens* and *Bonds Walls* to his wife for life, as an *united* entire gift; he revoked the devise of *Battens*, in order that it might descend to his heir at law, and by that means *separated* it from *Bonds Walls*; but not having, either by *expression* or *implication*, revoked the bequest of *Bonds Walls*, it remained as the testator left it. For there was no necessity that *Bonds Walls* should follow *Battens*, to fulfil the testator's intent that *Battens* should descend to his heir at law; his intent was fulfilled without affecting the bequest of *Bonds Walls*; *Battens* descending as perfectly to his heir, as if *Bonds Walls* had never existed.

It was however objected, that the intention of the testator was to annex *Bonds Walls* to and unite it with *Battens*; that the one was to be considered as the principal, the other as the accessory; and that the revocation of the devise of the one, was consequentially a revocation of both. But this objection supposed, that the testator's intent consisted of three particulars; namely, that *Battens* should go to his wife for life; that *Bonds Walls* should also go to her for life; and that they should be held together *inseparably*, by her and all the remainder men. This was certainly the *original* intent, but he afterwards changed it,

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it, and revoked the devise of *Battens*, in order that it might descend to his heir at law. He also, of necessity, revoked that part of his intent, that *Bonds Walls* should be held inseparably with *Battens*, for by the revocation he disconnected them for ever. But it did not follow, that because he revoked the devise of *Battens*, and consequentially repealed his intention of its union with *Bonds Walls*, that a second consequence should arise; viz. that the bequest of *Bonds Walls* should be revoked. The testator had only qualified his intention as to *Bonds Walls*, but not changed it. The two branches of his intention were lopped away, but the third remained.

As to the rents and profits of his chattel estates, which were given to his wife for so many years as she should live, if she should choose to reside at *Battens*, the argument was stronger against a consequential revocation; they being expressly given to her for life. It was a bequest upon a condition, which the testator had dispensed with, by taking away the possibility of performing it; the condition was revoked consequentially, but not the bequest. The testator declared, that his wife should have and enjoy for her life, the use of all the household goods, plate and furniture at *Battens*, and the stock on the said premises, both quick and dead; therefore the same question, and the same argument, applied to these as to the chattel estates, with this further observation, that the testator did not appear to prescribe, that she should enjoy them at *Battens*, as a condition annexed to the bequest, and that she should not enjoy them elsewhere; but the more probable sense of the words was, that she should have and enjoy the use of the furniture at *Battens*, and the stock on the premises during her life, using the words *at* and *on*, as words of description, and so applied to shew what furniture and stock he meant: These words *at* and *on* were proper for the sake of certainty, but if applied to the place where she was to enjoy them, there was something wanting to give the word *the*, speaking of the furniture, &c. a determinate signification; and therefore, upon either ground, she was entitled to these for life. But by the decree, *Bonds Walls*, the chattel estates, and the furniture and stock at *Battens*, were directed to fall into the residue of the personal estate, which was to be held in trust for the respondent; by which means, the testator's widow, whom he intended to make an ample provision for during her life, was reduced

reduced to a small tenement, and a proportion of an annuity of 50 l. a year for her subsistence, by the want of skill in the person who advised a tenant in tail, with the reversion in fee in himself, to suffer a recovery in order to effectuate his will. It was therefore hoped, that the decree would be reversed, and the appellant restored to so much as remained of the provision intended for her.

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On the other side it was said, that the leasehold estate called *Bonds Walls*, was described in the will as being *contiguous* and *adjoining* to *Battens*, the family mansion, and directed to be conveyed to, and *constantly to be enjoyed therewith, and never separated from it*. That the other chattels were given to the appellant for life, only on the *condition* of her residence at *Battens*: And that the household goods, plate, and furniture, and the live and dead stock, the use of which was given to the appellant, was confined only to that on *Battens*. From these circumstances, it appeared to have been the clear intention of the testator, to make *Bonds Walls*, and his other chattel estates, as well as the furniture and stock, accessory to *Battens*, his dwelling place, which he was fond of, and sat down with ambitious views to perpetuate; as was manifest by his disposing of it in strict settlement, and requiring the respondent and his issue, and other remainder men, to change their names as a condition of their enjoying it. That though in the course of succession which the testator had prescribed, *Bonds Walls*, as well as the other chattel estates, and the furniture and stock, would have gone to the appellant for life, if his will had not been revoked; yet this would have been so, merely as a consequence of its being an object with him, to make these chattel interests dependent and concomitant with *Battens*, to which circumstances he seemed to have been more attentive, than to any consideration of the persons to whom they were transmitted; and *Bonds Walls* in particular, was a desirable accommodation to the possessor of *Battens*, to and with which it was contiguous and intermixed. The devise therefore of *Battens*, the principal, being revoked by the recovery, the bequest of the chattel interests, the accessories must fall with it; and there would consequently have been an intestacy as to them, as well as *Battens*, but for the residuary bequests, under the trusts of which the respondent was become entitled to them, by having attained his age of 21.

J. Dunning.

J. Morris.

After

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DECREES
reversed.
M. S. Jour.
sub anno 1774.
p. 985.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the decrees therein complained of, as declared, that the bequest of the leasehold estate called *Bonds Walls*, and of all the testator's chattel estate, and the use of his household goods, plate, and furniture at *Battens*, and his live and dead stock, became consequentially revoked by the common recovery suffered of *Battens*; and the directions given by the decree, pursuant to such declaration; should be reversed: And it was DECLARED, that the appellant was entitled to the benefit of the said bequests, discharged from the condition of living at *Battens*, which the common recovery had put out of her power.

Case 16. *Thomas Pope,* Appellant.
George Roots, and Others, Respondents.

14th June 1774.

WILLIAM ROOTS being seised in fee of two messuages in *High-street*, in the town of *Maidstone*, in *Kent*, one in the occupation of *William Pensal*, and the other of *Christopher Harris*, and of another messuage there, called the *Angel Inn*; by indenture, dated the 2d of *May*, 1765, mortgaged all the said three houses to *Mrs. Elizabeth Bailiff*, for securing 400*l.* and interest, and also entered into a bond of the same date, for further securing the mortgage money; and by indenture, dated the 3d of the same month, he covenanted that he, and *Elizabeth* his wife, would levy a fine of all the said premises, which should enure to the use of *Mrs. Bailiff*, for the term of 1000 years, subject to the proviso for redemption in the mortgage deed, and from and after the expiration of the said term, to the use of such person and persons, and for such estate and estates, and subject to such provisos and agreements, as he the said *William Roots*, by any deed or writing, executed in the presence of two witnesses, or by his last will, executed in the presence of three witnesses, should direct and appoint; and for want of such direction or appointment, to the use of himself and his heirs; and the fine was soon afterwards levied accordingly.

William Roots being seised in fee of the equity of redemption of these three houses, and his wife dying, and he not having any issue, and being 60 years of age and in perfect health, was desirous of increasing his yearly income for his life; and therefore, in the month of *July* 1770, he proposed to the appellant, that if the appellant would agree to pay him a clear annuity of 70*l.* a year, during his life, he would convey to the appellant and his heirs, the two first mentioned messuages (which had been purchased by him some time before, for 250*l.*) free from all incumbrances; and the appellant agreeing to such proposal, an agreement in writing was thereupon entered into, and executed by *Roots* and the appellant, in the words following, viz.

“ *Memorandum.* It is agreed upon between *William Roots*, of
 “ *Maidstone*, in the county of *Kent*, surgeon and apothecary, of
 “ the one part, and *Thomas Pope* of *Maidstone*, Gent. of the
 “ other part, as follows (that is to say,) the said *William Roots*,
 “ for the consideration of one shilling of lawful money of *Great*
 “ *Britain*, to him in hand paid by the said *Thomas Pope*, at the
 “ signing hereof, the receipt whereof is hereby acknowledged;
 “ and also for and in consideration of one annuity or yearly
 “ rent charge of 70*l.* of like lawful money of *Great Britain*,
 “ in equal portions, to be paid half yearly by the said *Thomas*
 “ *Pope*, or his heirs, to the said *William Roots*, during his life,
 “ free and clear of and from all manner of taxes, deductions
 “ and abatements whatsoever, to be secured by a bond to be en-
 “ tered into by the said *Thomas Pope*, to the said *William Roots*,
 “ in the penal sum of 1000*l.* for the due payment of the said
 “ annuity, and also to be charged, by way of collateral security,
 “ upon certain messuages, lands, and hereditaments, situate, lying
 “ and being at a certain place called *Maginford*, in the parish of
 “ *Maidstone* aforesaid, and now in the tenure and occupation of
 “ the said *Thomas Pope*, his assigns, or undertenants, and cer-
 “ tain lands and hereditaments, lying and being at or near a
 “ certain place called *Vintney*, in the parish of *Bexley*, in the
 “ said county, and now in the tenure and occupation of *Simon*
 “ *Rouse*, his assigns, or undertenants, being the estates of the said
 “ *Thomas Pope*, and of the yearly value of 120*l.* the said *William*
 “ *Roots* shall and will, on or before the 31st day of *October* now
 “ next ensuing, by good and sufficient conveyances and assur-
 “ ances, such as the counsel of the said *Thomas Pope*, or his
 “ heirs,

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“ heirs, shall advise and think necessary, grant, bargain, sell,
 “ and convey unto the said *Thomas Pope*, his heirs and assigns
 “ for ever, or as he or they shall direct or appoint, all those
 “ two messuages or tenements, with the hereditaments to them
 “ and each of them belonging, situate and being in *High-street*,
 “ in *Maidstone* aforesaid, and now in the several tenures or oc-
 “ cupations of *William Pensall* and *Christopher Harris*, their as-
 “ signs or undertenants, discharged by the said *William Roots*,
 “ or his heirs, of and from all incumbrances whatsoever, ex-
 “ cept a lease granted to the said *Christopher Harris*, of the mes-
 “ suage or tenement now in his occupation, of which about
 “ nine years are now to come, and also except the quit rents
 “ to grow due from *Michaelmas* last; and it is further agreed
 “ upon between the said *William Roots* and *Thomas Pope*, that
 “ upon the title of the said *William Roots* to the said messuages
 “ and hereditaments before mentioned, being approved of by
 “ the counsel of the said *Thomas Pope*, or his heirs, and such
 “ conveyances and assurances as aforesaid, being duly executed
 “ by the said *William Roots*, and all incumbrances (if any there
 “ be) paid off and discharged by him, the said annuity or yearly
 “ rent charge, shall commence and begin on and from the 5th
 “ of *April* last past; and that the said *Thomas Pope* and his
 “ heirs shall receive and take the rents, issues, and profits of the
 “ said premises, from the said 5th day of *April*; and that upon the
 “ said messuages and hereditaments being so granted and con-
 “ veyed by the said *William Roots*, to the said *Thomas Pope* and
 “ his heirs, as aforesaid, he the said *Thomas Pope*, or his heirs,
 “ shall and will enter into such bond, and also well and effec-
 “ tually, and as the counsel of the said *William Roots* shall
 “ advise and think proper, duly sign, seal and execute all such
 “ acts, deeds, matters and things as shall be so advised and
 “ thought proper, for the charging the said messuages, lands and
 “ hereditaments in *Maidstone* and *Bexley* aforesaid, as and by way
 “ of collateral security for the payment of the said annuity or
 “ clear yearly rent charge of 70*l.* a year, in manner before men-
 “ tioned; with the usual covenants, and a power of distress to
 “ be contained in such deeds, in case of nonpayment there-
 “ of. Witness our hands, the 16th day of *July* 1770.”

William Roots, in order to enable him to convey the said two
 messuages to the appellant, free from incumbrances, and to car-

ry the said agreement into execution, caused a notice in writing, dated the 28th of *July* 1770, to be delivered to *Elizabeth Bailiff*, the mortgagee of the three messuages, purporting, that he intended to pay off her mortgage on or before the 2d of *November* then next; and he also gave directions to his attorney to procure him the money necessary for that purpose, and proposed that the same should be secured upon the *Angel Inn*, and upon two other messuages of his, in *East-lane* in *Maidstone*; and the mortgage to *Mrs. Bailiff* would have been paid off accordingly, and the agreement actually compleated before the 31st of *October*, if an indisposition which *Mrs. Bailiff* laboured under, had not rendered her incapable of joining in the conveyances necessary for that purpose.

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On the 2d of *November* 1770, before *Mrs. Bailiff* had recovered from her illness, and only two days after the time mentioned in the agreement, for the compleating the same, *William Roots* met with an accident on horseback, by his horse's tripping, and his being thrown forward upon the pummel of the saddle, which first confined him to his bed, and being attended by a fever, occasioned his death on the 12th of the same month.

William Roots, while his wife was living, made his will, dated the 30th of *January* 1766, in which, by virtue and in pursuance of the power to him reserved by the indenture of the 3d of *May* 1765, he devised all his freehold messuages and real estate to the respondents *Rogers* and *Whittel*, and their heirs, upon the trusts aftermentioned; viz. to the use of *Elizabeth* his wife, remainder to all and every his child and children on the body of his said wife in tail; remainder to his nephew, the respondent *Stephen Forth*, son of his sister *Ann Forth*, in tail; remainder to all and every of the children, as well daughters as sons, of his late brothers *John* and *Thomas Roots*, as tenants in common, in fee. And he thereby bequeathed all his personal estate to the respondents, *Rogers* and *Whittel*, upon the trusts therein mentioned, and appointed them his executors.

Upon the death of *William Roots*, the respondents *Rogers* and *Whittel* renounced the executorship of his will; and administration, with his will annexed, was thereupon granted to the respondents *Oliver* and *Sisley*.

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The appellant, after the death of *William Roots*, paid off the money due on Mrs. *Bailiff*'s mortgage, and an assignment thereof was made to the respondent *Pope*, in trust for the appellant.

In November 1771, the appellant filed his bill in the Court of Chancery, against the respondent *Thomas Roots*, the heir at law of *William Roots*, and also one of his coheirs, according to the custom of *gavelkind*, and against the respondents *John Roots* and *George Roots*, the other coheirs in *gavelkind*, and against the other proper parties; praying, that an account might be taken of what was due to the appellant, for principal and interest upon the mortgage so assigned to him; and that the respondents *Oliver* and *Sisley*, might either admit assets of *William Roots* sufficient to discharge the same, or might account for his personal estate, and that thereout the principal and interest which should be found due to the appellant might be paid to him, he offering to pay or allow thereout the half yearly payment of the annuity of 70*l.* which became due on the 5th of *October* preceding the death of *William Roots*; or if such personal estate should be insufficient to discharge the same, then that such deficiency might be raised out of the real assets of *William Roots*, by sale of a competent part thereof, and that all proper parties might be decreed to convey the two messuages mentioned in the agreement, to the appellant and his heirs; and that the respondent *Pope* might be decreed, upon the payment of the principal money and interest upon the mortgage, to assign the residue of the mortgage term, as to the said two messuages, in trust for the appellant and his heirs, to attend the inheritance of the same premises, and as to the residue of the mortgaged premises comprised in the same term, in such manner as the Court should think proper to direct.

The respondents, by their answer to this bill, insisted, that the agreement entered into between *William Roots* and the appellant, ought not to be carried into execution, for that it was highly reasonable to presume, that the parties had altered their sentiments relating thereto, inasmuch as the same was not completed in the lifetime of *William Roots*; and that the agreement was unfair and unreasonable, for that if *William Roots* had sold the inheritance of the two messuages, he might have got 850*l.* for the same, with which sum he might have purchased a much better annuity for his life, than the appellant agreed to pay; they

they said, that *William Roots* did not die seised of any real estate, except the three messuages included in the mortgage, and two other tenements in *East Lane* in *Maidstone*, and that his personal estate was not sufficient to discharge the mortgage, and his other debts.

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The cause being at issue, the appellant proved the agreement between *William Roots* and him, the conveyance by which the two houses were purchased by *William Roots* for 250*l.* the notice given to Mrs. *Bailiff* that he should pay in her mortgage money, and his directions to his attorney to apply to Mrs. *Bailiff*, for the writings of the mortgaged estate, in order to draw a conveyance to the appellant of the two houses, and that the title deeds were delivered by Mrs. *Bailiff* accordingly; but that the business was postponed on account of her indisposition, and upon no other account whatsoever, she having been several times applied to, and always found in a very weak state both in body and mind; it was also proved on the part of the appellant, that *William Roots's* death was occasioned by the accident which happened to him, he being before in good health.

On the part of the respondents there were not any witnesses examined to prove, that *William Roots* laid out any money upon the two houses contained in the agreement, after his purchase thereof for 250*l.* but two witnesses examined on their part deposed, that the two messuages were, as they believed, worth to be sold 806*l.* 8*s.* they computing the value thereof at 24 years purchase, upon the gross rents of 16 guineas each, at which the same were let; and the respondents proved, that *William Roots* attained the age of 60, in or about the month of *August* preceding the agreement; and two witnesses examined on their part deposed, that an annuity of 70*l.* for the life of a person aged 61, ought to be purchased for 589*l.* 8*s.* allowing the purchaser interest at 4*l. per cent.* the witnesses making such their calculation agreeable to the principles of Dr. *Halley*, adopted by *De Moivre* and *Simpson*. But no proof was made on the part of the respondents, that *William Roots* and the appellant had ever altered their intentions in relation to the agreement; on the contrary, it was proved by the appellant, that *William Roots*, some time after the execution thereof, told the tenant of one of the houses, that he was to pay his rent for the future to the appellant.

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On the 22d of *May* 1773, the cause was heard before the Lord Chancellor *Batburst*, when his Lordship was pleased to order, that the appellant's bill, so far as it sought a specific performance of the agreement, dated the 16th of *July* 1770, should stand dismissed without costs; and that it should be referred to the Master, to take an account of what was due to the appellant and the respondent *Pope*, his trustee, for principal and interest on the assignment of the mortgage, and to tax the appellant and the respondent *Pope* their costs, so far as related to such mortgage; and that upon the respondents, or any or either of them, paying to the appellant, what should be reported due to him for principal, interest and costs, and to the respondent *Pope*, what should be taxed for his costs, within six months after the Master should make his report, at such time and place as the Master should appoint, the appellant and respondent *Pope* should reconvey the mortgaged premises, free and clear of all incumbrances done by them, or either of them, or those under whom they claimed; and should deliver upon oath all deeds, papers and writings, in their custody or power relating thereto, to the said respondents, or such of them as should redeem the appellant as aforesaid, or to whom he or they should appoint. But in default of such payment, they were to stand foreclosed.

A. Wedderburn.
C. Robinson.

From so much of this decree as dismissed the appellant's bill, as to the specific performance of the agreement, he appealed; insisting, that in a Court of Equity, every compleat agreement is considered as if it were actually performed at the time fixed by the parties for the execution of it; and in this case, the agreement was to all intents and purposes compleat. The equitable title vested in the appellant, upon the execution of it; he was to receive the rents and profits from the 1st of *April* preceding; the payment of the annuity commenced at the same time; in short, nothing remained to be done, but the conveyance of the legal estate, which was prevented by mere accident: And the time for doing it having elapsed before the death of *Roots*, the relief prayed against his representatives was merely of course, unless such a fraud could have been imputed to the agreement, as would have entitled *Roots* himself to impeach it. If instead of *Roots*, the appellant had died, *Roots* would clearly have been entitled to a decree against the devisee or heir of the appellant,

for

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for a performance of the agreement; and it was difficult to conceive, that a contract should be binding upon the representatives of one of the parties, and not equally binding upon the representatives of the other. If the validity of a contract about any uncertain interest, was to be decided by the event, no such contract, however fair between the parties, or with whatever deliberation it was conducted, could ever be secure; and there was no reason for deciding so in the case of an annuity, which would not hold with equal or greater force, in the case of any other bargain in the most ordinary articles of commerce, where the advantage on one side might be very great by the sudden alteration of price. That the defence originally attempted by the pleadings in this cause was, that the parties had varied from their former agreement, and therefore delayed the execution of the deeds at the day: But this was contradicted by the evidence; from whence it appeared, that it was entirely owing to Mrs. Bailiff's bad health, that the compleating of the conveyances was delayed; and that Mr. *Roots* himself had given notice to the tenants of the premises, to pay their future rents to Mr. *Pope*. There was no pretence that the agreement was not fairly obtained, or that it was unreasonable. The houses were purchased by *Roots* about ten years before, for 250 *l.* and it did not appear, that he had been at any expence in improving them: But supposing the houses to have been of double the value they were purchased at, yet according to the calculations of the value of the annuity at the time it was agreed for, it greatly exceeded the value of the houses.

On the other side it was contended, that *William Roots* being dead before the agreement had been in any manner carried into execution, the whole of it could not now be performed; for that part of it by which an annuity of 70 *l.* a year was to be secured for the life of *William Roots*, was become void and totally at an end by his death, which happened before the commencement of the suit. No steps appeared to have been taken by the appellant for carrying this agreement into execution, until after the death of *Roots*, when it became certain, that he could have no benefit from the annuity agreed to be secured for his life; and that the respondents could pay no greater consideration for an estate, proved to be worth above 800 *l.* than 35 *l.* the amount of one half year's annuity; which, if the agreement had

E. Thurlow.
J. Dunning.
R. Bicknell.

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had been compleatly carried into execution in *Roots's* lifetime, would have been payable on the 5th of *October* preceding his death, but which the appellant never offered to pay. Courts of Equity do not decree all agreements that are fairly entered into, to be specifically carried into execution, but consider the several circumstances of the case; and where the specific performance of an agreement would be attended with great hardship to either party, the Court will not decree it. In the present case it was manifest, that the carrying this agreement into specific execution, would be a great hardship on the persons claiming under *William Roots*; and particularly, as it appeared that his estate, exclusive of the premises in question, was scarcely sufficient for the payment of his debts. Besides, it was in proof, that the agreement, at the time of making it, was a very hard bargain; for the estate was worth upwards of 800*l.* and the annuity might have been bought for less than 590*l.* and that an annuity of 95*l.* instead of 70*l.* for the life of *Roots*, supposing him to have been in full health, would have been no more than a reasonable consideration for the purchase of the estate in question. It was therefore hoped, that the decree would be affirmed, and the appeal dismissed.

DECREE
affirmed.
M. S. Jour.
sub anno 1774.
p. 1019.

Accordingly, after hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 17.

Between *Gregore Cojamaul*, and *Johannes* } Appellants.
Padre Rafael, - - -

Harry Verelst, Esq; - - - Respondent.

21st June, 1774.

THE appellant *Gregore Cojamaul* an *Armenian*, and a native of *Ispahan* in *Persia*, resided for many years in *Indostan*, particularly in the province of *Oud*, within that part of the dominions of *Sujah al Dowlah*, governed by the *Rajah Bulwantsing*.

Bulwantsing, and was extensively engaged in trade, both upon his own account and by commission. While he was so resident in *Oud*, and countenanced by the Rajah, as many others of his nation were, a party of armed Seapoys, in the Rajah's service, commanded by one of his officers, seized him on the 14th of *March* 1768, at *Barab* in the province abovementioned, and confined him in a fort; which he believed to have been done by authority from the respondent, as an order was shewn to him at the time of his seizure and imprisonment, to the following purport, *It is the order of the Governor of Calcutta, to seize and imprison Cogee Gregore*, meaning the appellant, without specifying any crime, or other cause of his abrupt imprisonment. Having been kept close prisoner for several days, he was carried to *Chowfat*, where he received letters of approbation and condolence from the Rajah and his Minister, and from thence was conducted under a strong guard of armed soldiers to *Patna*, and delivered to *Shitabroy*, the then collector of the Company's revenues, and guarded during his confinement there by a body of the troops entertained by the Company, in the territories assumed by them under the name of *Dewanee*. Under the same circumstances of confinement and ignominy, he was carried to *Muxadavad*, and there guarded and confined by troops under the command of Major *Fischer*, until the 23d of *May* 1768, at which time having travelled 600 miles, and sustained the most cruel and ignominious treatment, he was set at liberty, without having been accused or convicted of any crime, or even informed of the cause of such severities. By this sudden seizure, he was stripped of the whole or greatest part of his property, not having had time allowed to furnish himself with common necessities; and during the time of his confinement, he was afflicted with dangerous diseases.

The appellant *Cojamaul*, was at this time deeply interested in trade, concerned in extensive contracts, had very great debts outstanding, and had exceedingly beneficial licences of trade in the articles of saltpetre and opium, each of these advantages worth several thousand pounds. All these were lost to him by the respondent's conduct; most of his papers and books necessarily destroyed or lost, by his sudden seizure; and his misfortunes rendered irreparable, by an edict published at *Calcutta*, threatening with imprisonment, corporal punishment and confiscation, the

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appellant, or any in his behalf, who should go into the country to take care of his effects; and also prohibiting all *Armenians* from going to the territories of the princes abovementioned.

By this treatment, and the expences of seeking redress, the appellant was a loser of 15,000 *l.* and upwards; for recovery of which, he, in *July* 1770, caused an action of assault and imprisonment to be brought in the Court of Common Pleas, against the respondent, and one *Richard Smith*, and declared therein, laying his damages at 20,000 *l.*

To this declaration the respondent pleaded not guilty generally, and delivered his plea on the 26th of *August* 1771; in *Michaelmas* 1772, issue was joined between the parties, and notice of trial was given to the respondent's attorney, on the 28th of *May* 1773, for the sittings after the then next *Trinity* Term, at Guildhall, *London*.

But after every necessary step preparatory to the trial was thus compleated, the respondent filed his bill in the Court of Exchequer, praying, amongst other things, that a commission might issue for the examination of his witnesses in the *East Indies*, and in the mean time, that the appellant might be restrained from proceeding at law, until such time as the commission might be executed and returned. For this purpose the bill charged, that by an act of Parliament of the 9th and 10th of *William III.* intitled, "An act for raising a sum not exceeding
" two millions, upon a fund for payment of annuities after the
" rate of 8 *per cent. per annum*, and for settling the trade to the
" *East Indies*," his Majesty was authorised and impowered, by letters patent, under the Great Seal of *England*, to incorporate all such persons, and corporations, who should subscribe towards raising the money directed to be raised in and by the said act, and who should desire the same, by such proper names as his Majesty should think fit, to be one company, with power to manage and carry on their trade to the *East Indies*, and other the limits in the act mentioned, by a joint stock, and to have perpetual succession and a common seal, with all powers to grant and take, sue and be sued, and to choose their own managers, directors and officers from time to time, and such other provisions and clauses as should be necessary or requisite for the carrying on of such trade

trade as should be reasonable for his Majesty to grant; and that it should be lawful for his Majesty, by his charter of incorporation, to empower such company and their successors, to make reasonable laws, constitutions, orders and ordinances from time to time, for the good government of the said trade to the *East Indies*, and other parts in the act mentioned, and of the traders, agents, officers and others concerned in the same, and to inflict reasonable penalties and punishments, mulcts, fines and amerciaments for any breach thereof, and to levy such mulcts, &c. to the use of the Company. And it was further enacted, that such persons and corporations as should in pursuance of that act have a right or power to trade to the *East Indies*, &c. from and after the 29th of *September* 1689, should use and enjoy the whole and sole trade and traffic, and the only liberty, use and privilege of trading to and from the *East Indies*, in the countries and ports of *Asia* and *Africa*, and to and from all the islands, ports, havens, cities, towns and places of *Asia*, *Africa* and *America*, and any of them, beyond the Cape of *Bona Esperanza*, to the Streights of *Magellan*, and that the said *East Indies*, &c. should not, after the 29th of *September* 1689, be visited, &c. by any other of his Majesty's subjects, during such time as the benefit of trade thereby given should continue.

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The bill then stated, that King *William III.* by letters patent, dated the 5th of *September* 1689, under the powers contained in the abovementioned act of Parliament, constituted the subscribers and others therein named, one body politic and corporate, by the name of *The English Company trading to the East Indies*, with the usual privileges of a corporate body. That these letters patent enabled them to choose 24 directors, and enabled the members to meet for the purpose of making bye-laws and ordinances, and also granted to the Company the whole and entire liberty of trading and trafficking to and from the *East Indies*, and places in the act mentioned, and the rule and government of all such ports, factories and plantations, as should be at any time thereafter settled by or under the *English Company* in the *East Indies*, or other parts abovementioned; and that they should name and appoint governors and officers for their factories and plantations, and remove and displace them at their will and pleasure, and that such governors and officers might raise such military forces, as should be necessary for the defence of their forts and plantations.

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tions. That the want of sufficient powers in the Company, gave occasion to an act of 17th *George II.* which enacted, that notwithstanding the redemption of the annuities or yearly funds therein mentioned, the united Company of Merchants trading to the *East Indies*, should continue to have, use and enjoy the whole exclusive traffic, and the only privilege of trading into and from the *East Indies*, and other places mentioned in the act of 9th and 10th *William III.* and the said letters patent confirmed to them all other privileges and powers therein mentioned; declaring, that the same should continue to be held and enjoyed, and be practised and put in execution by the Company and their successors, for the better and more effectual securing to them and their successors, the whole, sole and exclusive trade to the *East Indies*, and parts aforesaid, and for preventing all other his Majesty's subjects from trading thither, and for securing their possessions and governing their affairs, as fully and effectually as if the same privileges, powers, remedies, &c. were severally repeated and re-enacted in the body of that act.

The bill then charged, that the *East India Company*, under the powers thus vested in them, on the 31st of *May 1764*, constituted Lord *Clive* governor of their affairs in the *Bay of Bengal*, and governor and commander in chief of *Fort William*, and its dependencies, to execute all powers and authorities thereunto belonging, subject to orders from the Court of Directors; and also constituted *William Brightwell Sumner*, to be second of their council of *Fort William*, Brigadier General *Carnac*, *William Ellis*, *Charles Stafford Pleydell*, *William Billers*, *John Cartier*, *Warren Hastings*, *John Johnstone*, *Francis Sykes*, *William Hay*, *Randolph Marriot*, &c. the other members of their council; appointing them to govern the Company's affairs according to the powers of the Company, and under such instructions as they should from time to time receive. That the critical situation of the Company's affairs in 1764, making it necessary to appoint a select committee, the Court of Directors, by their general letter, dated the 1st of *June 1764*, appointed the said committee, consisting of Lord *Clive*, Mr. *Sumner*, General *Carnac*, the respondent, and *Francis Sykes*, to whom they gave the sole power of final determination, with liberty to consult the council at large. And by letter, dated the 17th of *May 1766*, the Court of Directors continued the select committee, with power to fill up the occasional vacancies

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vacancies from among the council, to correct abuses, to suspend offenders in their service, and directed that all other persons not under covenants, who should offend, might be sent home; and by orders, dated the 24th of *December* 1765, the Court of Directors wrote to the following effect: "We think it necessary to establish, that all trade to be carried on within the provinces where factories are established, shall be carried on by our servants at such factories and their agents only, who shall transact the business of our other servants, on receiving the established commission; and on any refusal to accept such commission, or any tendency to monopolize, the servants of *Calcutta* and other parts, are at liberty to send their own black gomastahs, who are nevertheless to be accountable for their conduct to the Company's servants, within whose jurisdiction they reside; all jurisdictions not comprehended within the jurisdiction of such subordinate, shall be considered as within the jurisdiction of the board of *Calcutta*." That in consequence of these instructions from the Court of Directors, the governor and council from time to time issued orders for recalling all *English*, *Portuguese* and *Armenian* agents, and *European* stragglers; and particularly by an order, dated the 20th of *May* 1766, public advertisements were made for the return of the abovementioned gomastahs, or agents employed in different parts of the country, to the presidency, by the 1st of *August* then next, requiring their constituents to give them notice of these orders. That several of such gomastahs still remained and traded in the country, in breach of these advertisements and orders. That in *January* 1767, the respondent succeeded to the government, and was confirmed in it by a letter from the directors; and that *Richard Smith* became third in the council and select committee, and commander in chief of the army. That he acted in conformity to the acts of Parliament, charters and orders above recited, but that the appellant brought the action abovementioned against him, without any just cause or foundation; stating in his declaration the facts mentioned in the beginning of this case, whereas the respondent charged the contrary to be true; and that in *November* 1766, and down to *March* 1768, as well as before that period, the appellant was employed as agent for one *William Bolts* of *Calcutta*, who had quitted the service prior to *November* 1766, and had no longer any right to trade within the limits described in the charter, for himself, or to or for other servants of the Company

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within the territories of the Rajah *Bulwantsing*, or Nabob *Sujah Dowlab*; that he never was possessed of large property in the *East Indies*, or elsewhere, or if he was, that he had recovered the same. The respondent maintained, that if the appellant was seized and confined as abovementioned, it was by the authority of the Rajah or Nabob, and that he acted no otherwise therein than as a servant of the Company, who were at amity with the Nabob or Rajah, and under the authority of the acts, charters and orders abovementioned, and not through any malice: That the truth of these several charges would appear, and could be proved, by the testimony of several persons living in the *East Indies*, and by several authentic records, documents, orders, letters and papers, also in the *East Indies*; and that he could not make a full and compleat defence on the trial of the action, without having the benefit of such evidence and testimony, or a discovery and admission of the facts abovementioned. And the bill further charged, that the action was brought at the expence of *William Bolts*, and upon his instruction and warrant given to the attorney; and then the bill stated the names of the several witnesses material to the respondent's defence, and for whose examination he prayed a commission.

To this bill the appellant *Cojamaul* put in his answer, in which he denied, that the action was brought or prosecuted at the risk or expence of *William Bolts*, or that he had undertaken to pay the costs, but that they would be paid by himself. He admitted, that before 1766, and till *March* 1768, he was employed in commissions from *William Bolts*, within the territories of the Rajah and Nabob; and that previous to 1766, *Bolts* had been in the Company's service, and had then quitted it, but did not know whether he had any right to trade within the limits of the Company's charter, but understood that *Bolts* had such right, knowing that the Rajah had granted his licences for that purpose: The appellant insisted, that whether *Bolts* had such right or not, he had a right to act as agent for him there by commission, as well as any other *Indian* merchant, conforming to the laws of the country where such trade is carried on. He denied any knowledge of the extortion of *English* agents in the countries of the provinces abovementioned, or whether such resolutions or orders as charged in the bill, were made, being an entire stranger thereto, or that he was agent for any *Englishman* in the dominion

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dominion of the Nabob or Rajah, except for one *Francis Hare*, in the council of *Patna*. He also denied that he was seized or confined by order of the Rajah, Nabob, or any other country power within their jurisdiction, for such reason as in the bill mentioned; for that he was at that time actually employed by the Rajah in making saltpetre for him. He denied that he had any notice or admonition, except that about three days before his imprisonment, he was informed by *Francis Hare* abovementioned, that he had received a letter from Governor *Verelst*, under pain of being dismissed from the Company's service, to cause him to be seized and imprisoned, and sent prisoner down to *Muxadavad*, in direct violation of the known laws and usage of those territories. He admitted, that the respondent was a servant of the company, then at amity with the Nabob and Rajah; but denied that what was done to him was done in that capacity, or under the sanction of the acts, charters and orders stated in the bill, but from self interest, and malice to *William Bolts*; and denied that the charges in the bill could be proved by the testimony of several or any persons in the *East Indies*, or by any authentic records, documents or papers, or that there were several or any material witnesses in the *East Indies*, who could prove the truth of most or any of the matters of fact stated in the bill, or that the respondent might not make a compleat defence without the benefit of such evidence.

The appellant *Johannes Padre Rafael*, likewise brought an action at law against the respondent for assault and imprisonment, grounded on the same circumstances; and the respondent filed a similar bill in the Court of Exchequer against him, to which he put in an answer.

On the 9th of *July* 1773, the respondent moved the Court of Exchequer, in each of the suits brought by him against the appellants respectively, praying, that injunctions might forthwith issue under the seal of the Court in each of the causes, to stay the proceedings in the actions until the hearing of the causes, upon the merits confessed by the appellants in their answers: Whereupon, after hearing counsel on both sides, and reading the respective appellants answers, it was ordered by the Court, that injunctions should forthwith issue as prayed. And on the 13th of

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of the same month, the respondent obtained an order for a commission to examine his witnesses in the *East Indies*.

Ll. Kenyon.
A. Macdonald

From both these orders the present appeal was brought; and on behalf of the appellants it was said, that they had for many years exercised the profession of merchants, in those parts of *Hindustan* where *Armenians* are principally encouraged; were settled in the province of *Oud*, a territory independent of the *East-India* Company; and were engaged in extensive and lucrative undertakings on their own account. That the appellant *Cojamaul* was employed in the manufacture of saltpetre for the Rajah of *Bulwantsing*, in whose seigniory he resided; that the appellant *Rafael* was engaged in the service of the Nabob *Sujab al Doulab*, in whose territory he resided, and that both of them were very deeply concerned in executing commissions for *Indian* merchants, and also for Mr. *Hare*, a servant of the Company at *Patna*, and for *William Bolts*, whilst he was in their service, and after he had quitted it unknown to them. In the midst of these complicated affairs, they were ruined in their business, and (what is still more severely felt by gentlemen of their consideration in the mercantile profession in that part of the world) were ruined in their reputation, by the ignominious and cruel treatment which they had received, by order of the respondent. That no redress could be had for such outrages in *India*, which had induced them to seek it in this country; at this distance from their native soil; and under all the disadvantages, which strangers to the *English* laws, customs and manners, must be subject to. That redress they had sought in different ways, for a long space of time, had hitherto been disappointed in every attempt, and must be for ever disappointed unless they should succeed in their present application. That the matters stated by the respondent in his bill, to shew the necessity of injunctions, and commissions to examine witnesses in *India*, were evidently calculated for delay. That in cases circumstanced as the present, it was presumed, that the clearest and most satisfactory ground should be set forth, before the appellants were prevented from prosecuting the only remedy which their injuries would admit of. For should any of their witnesses, whom the respondent had suffered them to bring from *India*, and keep in readiness, die; should they themselves die; or should any one of many probable events happen, before the execution and return of the commission

from that very distant country; they might be for ever precluded from obtaining any redress. Every accident which could happen, must turn out in favour of the respondent, and against the interest of the appellants; and this was a conclusive reason for the Court's refusing any application, which would place the parties in so unequal a situation. And as the respondent had not supported the facts asserted in his bill by any affidavit, he had left them entitled to no greater degree of credit than bare assertions, which in the present instance, could not outweigh the pressing exigencies of the appellants case. That among the witnesses named by the respondent, as necessary for his defence, and proper to be examined under the commissions, some were independent sovereign Princes in *India*, or out of the reach of the process of the Court of Exchequer; others were in *England* at the time of filing the bills; and if the rest of the witnesses therein named, were essentially necessary towards the respondent's defence at law, it must have occurred to him sooner than at the distance of three years from the delivery of the declarations, to make that objection to the appellants proceeding in their actions. If therefore the suggestion of the necessity of these witnesses so late in the day, should be held a sufficient ground for suspending the proceedings of the appellants; it was evident, that from the great length of time requisite for executing the commissions, the many obstacles, whether real or fictitious, which might be thrown in the way of it in *India*, and the variety of accidents which might happen in the mean time; the appellants must despair of obtaining any remedy for the grievous injuries which they had sustained in their fortune and reputation; and with the reasons for which, the respondent, though frequently called upon, had never yet thought proper to acquaint them.—The facts which the appellants had stated in their declarations, it would be incumbent on them to prove by positive testimony. To these declarations, the respondent had pleaded not guilty, *generally*. The several facts charged in his bills, not being alledged *specially* by way of plea, must therefore be unnecessary to be proved at the trial; and as they all amounted to no more than this, that the respondent acted under mistaken ideas of his official authority, and not through malice to the appellants; the only effect they could have, would be in mitigation of damages, should the appellants be able to establish their cases. And this justification, the respondent could never

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have a better opportunity of proving than the present; as most of those who were in the council at the time of this transaction, were now in *England*; and every written document, such as the minutes of the council, &c. were now in the *India House*; from whence every circumstance of mitigation might be collected, which the respondent's case could possibly require. The appellants therefore hoped, that it would not be presumed, that the powers of the Court of law were insufficient to grant all proper relief to the parties; and that the injunctions would be discharged, as the facts on which the motions for them were founded, were not supported by affidavit, which is usually expected in cases, where delay would be of much less fatal consequence than the present.

J. Skynner.
J. Hett.

On behalf of the respondent it was contended, that it was not consistent with the rules of justice and equity, that any person should be forced on to a trial at law, without having the benefit of every material evidence in his favour; and as there is no method at law of procuring the testimony of persons who reside in foreign countries, it has long been the custom and frequent practice of Courts of Equity, to grant commissions for the examination of such witnesses, in order that their depositions may be used as evidence upon the trial at law; and to grant an injunction to stay the proceeding to trial in the mean time, as without this latter relief, the former would be of no use. That as such depositions cannot be used at law, if taken before the cause in Equity is at issue, it is often necessary to apply for the injunction upon the filing of the bill, before the time for answering is out, or even before the defendant has appeared, and which is granted upon an affidavit of the plaintiff in equity, that he has material witnesses abroad; or upon the coming in of the defendants answer, and before issue is joined; for otherwise the cause might be tried at law, before the Court of Equity could give the relief prayed by the bill; namely, a commission for the examination of witnesses in foreign parts. When such injunction is applied for after the coming in of the defendant's answer, it is granted or refused upon the general nature of the case, and the probability that the plaintiff has material witnesses resident abroad, appearing from the whole of the answer; but it is not necessary that there should be a full and precise admission, that the plaintiff in equity has material evidence for his

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his defence, living in foreign parts; for then no such injunction could ever issue, such an admission amounting to a confession on the part of the defendant in equity, that he has no good cause of action at law: It is however necessary, upon applying for the commission, for the plaintiff to make an affidavit that he has material witnesses abroad. A relief somewhat similar to this is given at law, by putting off the trial on account of the absence of a material witness, who is gone into foreign parts for a short time only, and expected soon to return; but that relief does not, nor can in its nature, extend to the case of witnesses who are resident in foreign countries. In the present case, it was confessed by the answer, that the cause of action wholly arose in the *East Indies*; that it was not grounded on a mere personal assault by the respondent upon the appellants, but was at most only a constructive assault and imprisonment, which as to the fact itself, and the matter of the general issue, depended upon a great variety of circumstances; and as to the amount of the damages, which the appellants estimate at a very large and enormous sum, they might be greatly lessened by the grounds, motives, and apparent necessity for the exercise of the authority, even if it should finally appear not to have been strictly legal; by the want of malice or ill will in the actor; by the manner of behaviour, the nature of the treatment, and the situation and actual losses of the parties supposed to be assaulted and imprisoned; all or most of which circumstances could not but be known to many persons now in the *East Indies*, some of whom were named in the bill, and by the answer admitted to be abroad; and from their situation and offices, must be supposed to be conversant with, and conversant of those circumstances.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the orders therein respectively complained of, should be reversed. *

ORDERS
reversed.
M. S. Jour.
sub anno 1774.
p. 1050.

* In consequence of this determination, the actions were tried; when the appellant *Cojamaul* recovered damages to the amount of 3200*l.* and the appellant *Rafael*, to the amount of 4000*l.* This information has been kindly communicated to the Reporter, by Mr. *Skirrow*, the respondent's attorney.

Sir

Case 18. Sir *John Eden*, Bart. and others, Appellants.

The Right Honourable *John*, Earl of } Respondents.
Bute, and others, - -

22d December, 1774.

ON the 17th of *April* 1727, heads of an agreement in writing were made, whereby *William Davidson*, Esq; agreed with *George Liddell*, Esq; and others, to grant them a lease of liberties of way-leave and watercourse, over and through his lands, grounds, moors, wastes or commons at *Beamish*, alias *Beamish Park*, and *Sockerly*, in the county of *Durham*, for the use of their collieries, for such term of years, and under such rent, covenants and conditions, and with such power of determining the same, as were therein particularly mentioned.

The parties acted under this agreement for a great many years, without any lease having been executed; but in *Trinity Term* 1766, *Morton Davidson*, Esq; as claiming under the said *William Davidson*, filed his bill in the Court of Chancery, against the respondents, as claiming under the several other parties to the agreement; praying, that a lease might be made of the liberties of way-leave and watercourse, so agreed to be demised, and that such restraints, covenants and provisos, as the Court should think proper and reasonable, might be inserted in such lease; and that the liberties so to be demised, might be confined to such collieries, as the lessees named in the said agreement had at the time of entering into the same.

To this bill the respondents put in their answers, submitting to a specific execution of the agreement; but insisting, that the liberties therein mentioned were meant and intended by the said *William Davidson*, to extend to all the collieries, which the lessees should be possessed of at any time during the term thereby agreed to be granted.

The cause being at issue, witnesses were examined on both sides, and on the 9th of *December* 1773, the cause was heard before

before the Lord Chancellor *Bathurst*; when his Lordship declared, that according to the true construction of the agreement, the lessees right of way-leave and watercourse, extended to all the coal mines and collieries in their possession at that time, or which they should afterwards be possessed of during the term; and therefore referred it to a Master, to approve of a lease pursuant to the said agreement, with covenants usual in such leases *.

Soon after pronouncing this decree, the respondents preferred a petition to the Lord Chancellor, stating, that they had several proofs taken in the cause, and several exhibits to be read, which they found by the Register's minutes were not entered as read; and that there was no direction given for entering the proofs and exhibits as read, which they were advised was very material to be done.—That they also found by the minutes, that the Master was to approve of a lease pursuant to the agreement, with covenants usual in such leases; but they apprehended, that the direction should have been, *that the Master do approve of a lease pursuant to the said agreement*, without any special directions touching the covenants to be contained in such lease: They therefore prayed his Lordship, to rectify the minutes in these particulars.

On the 21st of *January*, 1774, this petition came on to be heard, when his Lordship was pleased to order, that the evidence on both sides should be entered as read; and that the minutes should be rectified, according to the prayer of the petition.

From so much of this order, as directed the evidence to be entered as read, the present appeal was brought; and on behalf of the appellants it was argued, that the decree on the hearing of the cause, was the judgment of the Court on the construction of the agreement; and that the agreement itself, with such part of the evidence as had been read by the plaintiff, was all

E. Thurlow.
J. Dunning.
Ll. Kenyon.

* From this decree, so far as it related to the construction of the agreement, the plaintiff appealed: But that appeal being afterwards withdrawn, and a new one presented, the case on which it was grounded, and the determination upon it, will appear in order of time.

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that was then before the Court. That no evidence was at that time offered on the part of the respondents, in support of the construction which they contended for; and if any had been offered it would have been objected to, great part of it being totally inadmissible. That the purport and nature of the evidence, was not on the hearing of the cause, or on the respondents petition; either read or stated to the Court. That upon the hearing of all appeals from an inferior to a superior Court, this principle universally prevails, that no evidence can be received which was not laid before the Court below; nor can any evidence which was received below, be objected to above, unless the admission of improper evidence be among the points of the appeal: For if it were otherwise, the superior Court, instead of determining on the rectitude of the decree appealed from, would be exercising an *original*, not an *appellate* jurisdiction; and might appear to be imputing errors to the Court below, where there was no pretence that any had been committed. It is not indeed unusual to rectify minutes, taken at the time of pronouncing a decree, where something which really passed, and ought to have been entered, has by mistake been omitted: But the objection in the present case was, that the order, though founded on a petition to rectify the minutes, applied to a point in which the minutes were not wrong, but clearly right; and the entering this evidence as read, was not conformable to, but directly against the truth of the case. There may have been instances, where, with a view to save time, evidence *which has been stated on one side, admitted on the other, and judged of by the Court*, has been entered as read, though it was not actually read at the hearing; but an order to enter evidence as read, which was not read, nor at all in the consideration of the Court, at the time of pronouncing the decree, was conceived to be without precedent. And if, on the hearing the appeal in this cause from the Lord Chancellor's decree, the evidence on both sides was to be gone into, a case would be laid before the House, totally different from that which was before his Lordship.

A. Wedderburn.
R. Perryn.
J. Madocks.
J. Ord.

On the other side it was said, that it is, and always has been, the practice of the Court of Chancery, to receive petitions from either side to rectify the minutes of any order or decree pronounced by the Court, while the same rests in minutes, without

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out being drawn up by the Register in form; and to vary or alter such minutes, if the Court shall see sufficient cause, at any time before the order or decree be regularly passed by the Register, and entered. That while the decree rests in minutes, it is to be considered as imperfect, and liable to be altered at any time, by application to the Lord Chancellor, in order to make the same perfect and agreeable to his Lordship's opinion, before it is drawn up. For if appeals from imperfect minutes was to prevent any alteration in them, it would subject parties to great inconvenience, and would debar the Lord Chancellor from rectifying his minutes, though the necessity might arise from mere inaccuracies in penning, or from the Register's not being exact in taking them down. That the direction in the present case, for entering the evidence on both sides as read, was both just and necessary. In the course of the hearing, the written evidence on the part of the respondents, to shew the several leases possessed by the partners on the 17th of *April* 1727, and those acquired after that period, had been stated to the Court, and admitted without being read; but no notice was taken of this in the minutes. The parol evidence had not been read, because the opinion of the Court in the respondents favour, was given upon the argument itself; it was therefore unnecessary to read proofs in confirmation of that opinion. But the evidence itself was competent and proper; not only as it explained the view with which the parties entered into the agreement of *April* 1727, but also proved by the acts of the appellant, his brother and his father, as they respectively became owners of the estates, for a great number of years, that they as well as the respondents understood, that the agreement extended to collieries acquired since signing the articles. It is equally fair to both parties, when a cause is carried to a superior judicature by appeal, that it should be fully heard before the appellate jurisdiction, and either party at liberty to resort to the evidence; and this is so generally understood, that it is a common practice on hearing a cause, where there is a probability of appeal, to enter all the evidence on both sides as read. Besides, the appellant himself had entered evidence, under the very order from which he now appealed.

After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the order complained of, so far as it directed the

ORDER
reversed.
M. S. Jour.
sub anno 1774.
p. 76.

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the evidence on both sides to be entered as read, should be reversed: And that the respondents should be at liberty to apply to the Court of Chancery to rehear the cause. And it was further ORDERED, that the appellants should be at liberty to withdraw their other appeal, without prejudice*.

Register, Lib.
A. 1775.
p. 771.

* The cause was accordingly reheard on the 28th of July, 1775, when, after a long debate, the former decree was affirmed.

Case 19. *Ann Salter*, spinster, - - Appellant.
Francis Hite, and Others, - Respondents.

31st January, 1775.

* *Ante*, p. 11.

IN consequence of the order made on hearing the former appeal in this cause*, the issue was again tried at the summer assizes for the county of *Devon*, in the year 1773, before Mr. Baron *Adams* and a special jury; when, after a trial of near 18 hours, the Jury brought in a verdict against the will.

This was so extraordinary a case, the evidence being so contradictory, and the circumstances so complicated, that for a right understanding of the final result, it may not be improper to subjoin in a note, a state of the evidence on both sides, together with some very pertinent observations thereon, as contained in the appellant's printed case†.

The

The Respondents Proofs.

† It being admitted that the appellant was heir at law to the deceased, the counsel for the respondents insisted, and called witnesses to prove, that the will in question was prepared and attested by Mr. *Paull*, and was executed at the house of *John Vicars*, who then kept the *Turk's Head Inn* at *Exeter*, and was afterwards delivered to *Susannah Franks*, the housekeeper of *Francis Hite*, by the supposed testator himself, with directions, in case of his death, to deliver the same into the hands of *John Partridge*; and that accordingly, *Susannah Franks*, in the latter end of the month of *August*, wherein *Michael Salter Ashe* died, or about the beginning of the next

The respondents apprehending this second verdict to be contrary to the weight of evidence, applied on the 20th of January

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next month, delivered the pretended will to *John Partridge*, from whom *Francis Hite* received it.

The respondents then attempted to prove the execution of the will, and in order to mark the time so strongly, that it was impossible for the witnesses to be mistaken in this particular, they attempted to prove, that it was executed on one of the days whereon a great fair was held, called *Lammas Fair*, in the city of *Exeter*, in the year 1766, which began on *Tuesday* the 5th, and ended on *Thursday* the 7th of *August*. By these circumstances, all the witnesses affect to ascertain the date of this transaction: And *John Melhuish*, by a circumstance mentioned in his evidence, fixed it to be on the 8th of *August*.

George Coryndon, *Samuel Sweeting*, and *John Gear*, Gentlemen, and *Richard Wootton*, writer, deposed to their knowledge of *Mr. Paull*, and of his hand writing; that they believed the name of *Paull* indorsed on the will, from similitude, to be his writing. *Sweeting* deposed, that *Paull* was a man of accuracy and precision in business; and *Coryndon* and *Wootton* on their cross examination, said he was an exact man, and that they apprehended would, if he had observed the interlineation, have taken notice of it in the attestation; and all of them deposed to their belief, that the will, interlineation and indorsement on the cover, were of the same hand writing; that it was not *Paull's*; that they were all acquainted with the hands writing of the attornies and writers in *Exeter*; but that they knew not, nor had ever seen the hand writing of the will. *Wootton* deposed, that he frequently wrote for *Paull*, and that the spelling in the will was not *Paull's* manner of spelling, for that he spelt in the modern fashion.

Several others were called, and proved, by similitude, the hands writing of the testator, and of *Josias Salter* and *Elizabeth Caunter*, the other two persons whose names are set as witnesses to the pretended will.

John Vicars, *Mary* his wife, *Margaret Caser* their servant, and *John Melhuish* writing clerk to *Francis Hite*, deposed, that on the 6th, or 7th of *August* 1766, being *Lammas fair* days, *Michael Salter Ashe*, *Josias Salter*, *Matthew Andrew Paull* and *Elizabeth Caunter*, were at the house of *Vicars*, at the *Turk's Head Inn*, at *Exeter*.

The said *John Vicars* (who being since accused of having committed the crime of forgery, hath destroyed himself) particularly deposed, that *Michael Salter Ashe* the testator, and *Josias Salter*, came to his house together about 11 or 12 o'clock in the forenoon, asked for a room and went away; came again in the afternoon, about two or three o'clock with *Mr. Paull*, and the witness shewed them into the dining room, took out a table for them to do business on, and saw *Paull* take a paper parcel out of his pocket, out of which he took a parchment, and threw it on the table; then the witness went down stairs and met *Elizabeth Caunter*, who after being informed that *Michael Salter Ashe* and *Josias* were above stairs, went into the dining room: That in a few minutes afterwards the bell rang, and he went up, and on opening the door, heard *Paull* reading a parchment, which from some words that he heard, he

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January 1774, by motion to the Court of Chancery, for a new trial of the former issue; and upon full debate of the matter, the

understood to be the will, but could not remember the words; and afterwards, going into the room again, saw *Paull* writing on the parchment; then went down stairs; and being called up again, was ordered to bring a candle, which he carried up lighted, and left it. *Mr. Paull* soon after went away, and *Mrs. Caunter* followed him: That the witness then went up, and drank negus with the supposed testator and *Josias Salter*; that the parcel was then on the table. *Josias* said, "Here is the thing which I have been so long uneasy about, and wishing to have done. There is Doctor *Salter's* will: Now every thing is settled to my mind, I shall die contented." *Michael Salter Ashe* then expressed himself to *Josias*, who was his wife's brother, as follows; "Now I have made my will, I don't know what I shall do with it. I dare not carry it home; my wife will be so uneasy, she will kill me." To which *Josias* replied, "You know you have friends enough that will keep it for you; there is Mr. *Partridge*, my master *Mr. Hite*, or *Mr. Mare*, where it will be as safe as in your own custody." That it was inclosed in a white cover, sealed with a large broad seal; then *Josias* took it up, and they went away; and they were in the house in the whole, about one hour and a half: That no other persons were in the room, besides the supposed testator and the three witnesses, and they desired the witness not to admit any other person.

Mary Vicars, the wife of the last witness, deposed, that she saw *Elizabeth Caunter* at the *Turk's Head*, in the time of *Lammas* fair, and saw her go up stairs to the dining room; and seeing her so go up, asked *Melhuish* who she was, and was told by him, that it was *Elizabeth Caunter*. That on that day or the next, she asked her husband what the company in that room had been doing; who told her that he imagined they had been about Doctor *Salter's* will.

Margaret Caser, a servant, deposed, but very incorrectly, as to the time, and all other circumstances, that *Elizabeth Caunter* was at the *Turk's Head* during the same fair.

John Melhuish, *Hite's* writer, deposed, that he saw, during the said *Lammas* fair, the said *Paull*, *Michael Salter Ashe*, *Josias Salter* and *Elizabeth Caunter*, come down stairs from a room at the *Turk's Head*: That he asked *Josias Salter* what they had been about; who said, that they had been executing the Doctor's (meaning the said *Michael Salter Ashe's*) will; and he fixed the day on which this happened, to be the 8th day of *August*, by the circumstance of his then having come to the *Turk's Head*, from a house in *Southgate* Street, where he had been to settle a cause, in which one *Jasper*, had been arrested, and was then discharged. In this cause the warrant for arresting *Jasper*, appeared to be granted on the 7th, and by the positive evidence of *Philip Sarell*, the bailiff who made the arrest, *Jasper* was discharged on the 8th.

Mary Cookeley deposed, that she remembered her sister in law, *Elizabeth Caunter's* coming to her in *August* 1766, at *Mr. Gibbs's* in *Exeter*, where she then lived as servant, about one o'clock; stayed a few minutes; said she would return and drink tea, and that she was then going to *Mr. Paull's*. *Elizabeth Caunter* afterwards returned

the Lord Chancellor was pleased to order another trial, at the then next *Lent* assizes for the county of *Devon*.

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And

turned in the afternoon about five o'clock, and said she had been on business about Doctor *Salter's* will; drank two glasses of wine; was in a bad state of health, pale and yellow, and her face bloated; dressed in mourning, walked very poorly, and said she came on a double horse, but did not tell who rode before her, nor where her horse was, nor of her having been at the *Turk's Head*: That *Gibbs's* house was distant from *Paull's* about 400 yards, and *Paull's* house from *Vicars's* house about 800 yards, and it was the same distance from *Vicars's* house to *Gibbs's*. This witness, on the former trial did not recollect, nor has any other ever said, how *Elizabeth Caunter* was conveyed, or supposed to be conveyed to *Exeter*.

Peter Cann, a barber in *Crediton* deposed, that the latter end of *July* 1766, *Josias Salter* and the Doctor (meaning the said *Michael Salter Ashe*) came together into his shop, and that they first talked softly together in a corner of his shop, then *Josias* said aloud, "Doctor let us go to *Exeter*, Mr. *Paull* will be ready for us before we come:" The Doctor went off; *Josias* tarried, and witness asked him, "If the Doctor was going to settle his will;" to which *Josias* answered, "The Doctor shall make a will, for if he should die without a will, what will Mrs. *Ann* (meaning the appellant) do? the family will be in confusion, she is not qualified."

Samuel Mare (serge weaver) deposed, that *Josias Salter* served *Hite*: That there was great intimacy between *Josias* and the supposed testator: That in *June* or *July*, the Doctor came to the witness's house, and said he desired to speak with him, and told him that *Josias* was going to be tapped, and would not live long, and asked the witness "if he would give him leave to make use of his name as a trustee in his will, with another friend?" to which he consented: And further deposed, that in about a week, 10 days, or a fortnight afterwards, he met Mr. *Ashe* in the street, who addressing himself to the witness said, "I've done that, now I am easy:" That the witness apprehended he meant his will; and the supposed testator further added, "If I do not take care of the estate, they (meaning the family) will spend it all." And this witness, on his cross examination, said that he told *Hite* of the conversation between him and the supposed testator, in a day or two afterwards.

Robert Stribbling, } These witnesses deposed, that they heard Doctor *Salter* make
Thomas Lee. } use of expressions of regard and friendship for *Hite*.

Elizabeth Saunders deposed, that in the year 1766, she was a boarder at Mr. *Brake's*, in *Crediton*, where Mrs. *Caunter* also lived, and attended the wine cellar, and was a kind of housekeeper, and was a little addicted to drinking: That she was confined to her bed about the 20th of *August*, and was before that time in an ill state of health, but was not, as she believed, confined to the house; that she never saw her go on horseback. And on her cross examination said, she was very little in company with *Elizabeth Caunter*; did not mind a great deal about her, and being frequently out from morning till night, did not see *Elizabeth Caunter* for whole days together, and therefore had no particular recollection of her illness, before the 20th of *August*; and

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And upon a second application by the respondents for a variation of this last order, by having the issue tried at the bar of the

and said, that *Elizabeth Hole* waited on *Mrs. Caunter*, and she and the other persons and servants about her, must know more of her than the witness.

Alice Moris deposed, that *Mrs. Caunter* was at her house in *Lammas fair* 1766, about 12 o'clock; was much swelled and very ill; said she had business at the *Turk's Head*, and bought two or three pairs of stockings, and left them on the stall, went away and returned again soon after for them: That it was the year after her husband's death, who died in 1765, and about a month before *Mrs. Caunter's* death: That she lived next door to the *Turk's Head*, but never heard of any dispute about *Doctor Salter's* will, or *Mrs. Caunter's* being at *Exeter* in *Lammas fair* 1766, till about eight weeks ago, when *Vicars's* hostler, and *Hite's* man, *Melhuish*, were standing on the outside of her shop talking about *Mrs. Caunter*; and then the witness said, "she was there, and bought goods of her;" but there was no entry in the books of the witness of any goods sold to *Elizabeth Caunter*, nor could she mention any circumstance, connected with her transaction with *Elizabeth Caunter*, by which she could remember to have seen her at that particular time: That *Hite* had been at her house within a week, and had been there often within four months.

Susannah Franks, who was *Hite's* housekeeper, and died before the first trial, said in her deposition upon the commission, that *Mr. Ashe*, in *August* or *September* 1766, came to *Mr. Hite's* house, and he not being at home, *Mr. Ashe* delivered her a paper parcel, containing (as he informed her) his will, and desired her to take care of it, and not let it come to his wife's knowledge, because, if it should, he should live a more uneasy life with her than he did already; and desired her to keep the parcel, and if he should die, to deliver it to *Mr. Partridge*, the first opportunity after his death; that she took care of it; and *Mr. Ashe* dying in *August* 1767, she delivered it to *Mr. Partridge* about the latter end of that month.

John Partridge, the elder, deposed, that in *August* 1767, *Susannah Franks* delivered him the paper parcel sealed up, at *Mr. Hite's* house, with a request not to open it till called for; and in a few weeks after, he received a letter from *Mr. Hite*, desiring the witness to deliver it him, and thereupon he sent his son with it to *Hite*, sealed up in the same manner he received it.

John Partridge, junior, deposed, that he received the parcel from his father sealed up; and that he carried it to *Mr. Hite* at *Crediton*, where it was opened in the presence of the widow.

The former verdict for the will was produced and admitted,

The Appellant's Proofs.

William Webber deposed, that he lived with *Matthew Andrew Paull*, whom the respondents suppose to be the drawer of the will, for a year and a half next before and home to his death in *April* 1767, and wrote for him during all the time, and that he verily believes *Paull* did not prepare, or cause to be prepared, the will then produced

the Court of King's Bench, by a jury of the county of *Middlesex*, his Lordship was pleased, on the 8th of *February* following, to direct

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duced and shewn him, and assigned as reasons for his belief, that *Paull* used to impart to him all his business; that he never communicated to him aught of the will then produced, and was thoroughly convinced and persuaded, that a will of the length with the instrument then produced, could never have gone through *Paull's* office, without this witness's knowledge; that since *Paull's* death, he had made strict search among his papers, and could not find any instructions, draft, or other traces of Mr. *Ashe's* will; that *Paull* kept instructions for and drafts of all wills prepared by him, tied up in separate bundles; that *Paul* himself and this witness generally transacted the business, unless they were much pressed, and he used at such times to employ Mr. *Wootton*, Mr. *Bale*, or Mr. *Bisgood*, writers in *Exeter*, to engross deeds and other instruments. This witness, on perusing the instrument produced as the last will and testament of *Michael Salter Ashe*, declared, that the body of the instrument was not of the hand writing of either of the said writers employed by *Paull*, and that he did not know of whose handwriting it was, and never saw writing like it; that *Paull* never spelt in the manner the will is spelt; that he had examined Mr. *Paull's* books of account of business done, which in his judgment were accurate; that *Paull* in his cash-book entered all monies received and paid, and kept a book in which he made memorandums of business to be done; that he found in that book, an entry by Mr. *Paull* to attend a survey for Mr. *Holman*, at the *Half Moon* in *Exeter*, on the 7th of *August*; and then produced the survey terms, which were of the witnesses handwriting, and the biddings were in *Paull's* handwriting, and that the survey was held at 3 o'clock in the afternoon.

Paull's books were then produced, and confirmed the evidence given by this witness.

The appellant then produced, to prove the *alibi* of *Josias Salter*, *Philip Sarell* a bailiff, who produced a warrant from the sheriff of *Exeter*, dated the 7th of *August* 1766, against one *Jasper*, at the suit of the respondent *Hite*; and deposed, that he arrested *Jasper* the day the warrant bore date, and that he continued under arrest 'till the next day, when he was discharged.

On the part of the appellant, the strongest and most positive evidence was given, to prove the impossibility of *Josias Salter's* being at the *Turk's Head*, on the 7th or 8th of *August* 1766, whereon the will is supposed to be executed, being then in the last stage of a dropsy, and tapped on the 8th; and that he was in a bed-room at the *Barnstaple Inn*, from 11 in the morning of *Thursday* the 7th, till he was carried to *Sowton* on *Saturday* the 9th.

Josias Rogers, gardener, deposed to his long and intimate acquaintance for 30 years with *Josias Salter*, Mr. *Ashe* and Mrs. *Ashe*. That in *August* 1766, on *Thursday*, in the *Lammas* fair week, soon after 12 o'clock at noon, he received a message from them by his wife, to attend them at the *Barnstaple Inn* in *Exeter*. That he accordingly went there, and found them all together in a lodging room; that they told him they came that morning from *Crediton*; that the witness dined and

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direct the issue to be tried accordingly, by a jury of the county of *Devon*, upon the respondents consenting to take *nisi prius* costs, in case a verdict should be found in favour of the will.

From

continued with them in the same room from the time he came, till night, and helped *Josias Salter* to bed, who was so very weak and ill of a dropsy, that he could hardly go over the room, and that *Dr. Ashe*, the supposed testator, or his wife, was not out of the witness's sight a quarter of an hour from the time he came there, to the time of his going away at night; that he saw *Josias Salter* the next day, just after he had been tapped, as he believes about 11 o'clock in the morning, tarried with him all that day, and laid with him that night, and the next morning helped him into the post chaise which conveyed him to *Sowton*.

Elizabeth, wife of the said *Josias Rogers*, deposed, that on the 7th of *August* 1766, the year in which *Josias Salter* died, she about 11 o'clock in the morning, received a message from *Mr. Ashe*, desiring her to come to the *Barnstaple* Inn to him; that she immediately went, and there found *Mr. Ashe* and his wife and *Josias Salter* together; tarried with them about an hour, and then went home to send her husband to them, at his return from his work, which was about noon; that he immediately went, and tarried with them all that day, as she believed; that *Josias Salter* was very much swelled, and so weak, that he could not without great difficulty walk over the room: That she went to them a second time, that afternoon, between 2 and 3 o'clock, and found them and her husband all together, and tarried with them about an hour; and further deposed, that she was present the next day, when *Josias* was tapped by *Mr. Symonds*, and that she assisted in the operation.

John Symonds, surgeon, deposed, that on *Friday* morning the 8th of *August* 1766, he received a message from *Mr. Ashe*, requesting his attendance at the *Barnstaple* Inn, to tap *Josias Salter* for a dropsy; that he went there, and found him in a bedroom with *Mr. and Mrs. Ashe*, and he thinks *Elizabeth Rogers* was there; and that he then tapped the said *Josias*, whose constitution was much impaired; that he was very weak, full of water, and could not walk far or well, and could not, in his opinion, walk from thence to the *Turk's Head*.

The strongest and most positive evidence was given to prove, that *Elizabeth Caunter*, from the 31st of *July* 1766, the date of the will, and in fact from the 4th of *July* to her death, which happened the 21st of *September* following, was never out of *Crediton*, which is distant from *Exeter* eight miles. It is incontestably proved, that she laboured under a dropsy, and a complication of disorders, from the middle of *July*, which increased on her until her death. And if the evidence of the respondents witnesses deserved credit, she was in *Exeter* from 12 o'clock till candlelight of *Friday*, the 8th of *August*, and consequently must have set out from *Crediton* early in the morning, and returned to *Crediton* late at night, and rode 16 miles on horseback, and walked about a principal part of the city of *Exeter* whilst she was there.

From both these orders, the present appeal was brought ; and on the appellant's behalf it was said, that the balance of evidence clearly preponderated in her favour. That the clear and positive proof, that *Elizabeth Caunter* was at *Crediton*, during the fair

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J. Mansfield.

J. Dunning.

Elizabeth Hole, servant at Mr. *Brake's* in *Crediton* in the year 1766, deposed, that Mrs. *Caunter* was housekeeper to Mr. *Brake* ; and that the latter end of *July*, and particularly that week in which the *Lammas* fair was held at *Exeter*, Mrs. *Caunter* was extremely ill ; that on *Monday* the 4th of *August*, she asked Mrs. *Caunter* leave to go *Lammas* fair, who said, " if I am so ill tomorrow as I am to day, I shall not be able to let you go." That the witness said, " I will get *Martha Buckingham* in my stead ;" to this Mrs. *Caunter* consented, and *Martha Buckingham* came there that evening, before the witness left the house ; that in the evening she went to *Exeter*, and returned home again the next day, *Tuesday* in the evening, and found Mrs. *Caunter* at home very ill ; that she attended her the whole of the two following days, *Wednesday* and *Thursday* the 6th and 7th ; that she did not go out of doors, and on *Thursday* the 7th, she could not do any thing without the witness's assistance ; that she always attended her, and during the whole of the residue of that week was not absent from her half an hour at any one time.

Martha Buckingham deposed, that she was hired to attend Mrs. *Caunter* in *Lammas* fair week, in the room of *Elizabeth Hole* ; that she was with her before *Elizabeth Hole* set out for the fair, and was not absent from her at all till her return on the *Tuesday*, and that she saw Mrs. *Caunter* every day of that week, mornings and evenings ; and that she was so very weak that she could not go the length of the Court, (meaning the Affize Hall) without sitting down.

Ann Penrose, who lived in the same house with Mrs. *Caunter* in the year 1766, deposed, that in *Lammas* fair week *Elizabeth Hole* went to *Exeter* ; that the witness was with *Elizabeth Caunter* the whole of that week ; that she walked lame and feeble, had a dropsy and weakness of breath ; that every person must observe it in her walking ; that she could not in her opinion have gone to *Exeter*, and could not go there without the witnesses knowledge ; and that *Elizabeth Hole*, *Charity Ford*, *Martha Buckingham*, and *Elizabeth Damerell* were generally with her.

Charity Ford deposed, that in the year 1766, she was apprentice to Mr. *Brake* in the shop, and lived there six years ; that *Elizabeth Caunter* was not at *Exeter* after the 4th day of *July*, in the year 1766 ; and that she fixed on that day, from bringing home some things for Miss *Brake* ; and that she could have known Mrs. *Caunter* had been, after this time, absent for more than three or four hours. That she was first taken ill about the 8th of *July*, and the last time when ill about the 21st of *August*, and from that time confined to her bed, till her death. That she was bled in the beginning of *August* 1766, and the whole of *Lammas* fair week was very ill and confined to the house. That she was never absent from *Elizabeth Caunter*, for more than an hour or two. That she remembered *Elizabeth Hole's* going to the *Lammas* fair at *Exeter*, and *Martha Buckingham* supplying her place : And further deposed, that Mrs. *Ashe* paid a visit to Mrs. *Caunter* about a month before her death, and on her leaving the room, Mrs. *Caunter*

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fair week, and that *Josias Salter* was not present at the *Turk's Head*, on the day of the supposed execution of the will; the negative

Caunter said, "I wish *Michael Salter* would make a will, for the sake of poor *Hannah*," meaning his wife. *Mrs. Damerell* said, "do you think there is a will?" *Mrs. Caunter* said, "I am very certain there is no will, and I wish he would make one for poor *Hannah's* sake; if not, there will be the duce of a spudder."

Elizabeth Damerell deposed, that in the year 1766 she lived in *Crediton*, with her mother; that she was very intimate with *Mrs. Caunter*, who died the 21st of September in that year; that from the 20th of July, she visited her every day several times, and was never absent more than four or five hours in any one day till her death. That she could not have gone to *Exeter* without her knowledge; that she was very ill and weak, and bled by her apothecary *Mr. Hewgoe*, the 2d of August; that her disorder afterwards increased upon her, and she could not walk without holding by somewhat to support herself. And the witness deposed, she was frequently whole days with her; and that *Mrs. Caunter* in her last illness, when *Mrs. Ashe* had been to visit her, soon after *Mrs. Ashe's* quitting the room, said, "I wish *Mr. Salter* would be persuaded to make a will, for the sake of poor *Hannah*." That the witness asked her if he had not made a will; to which she replied, "No, and I fear he never will; if so, there will be the duce and all of a spudder."

Elizabeth Pain deposed, that *Mrs. Caunter* made the same declaration to her in her last illness, respecting *Mr. Salter's* not having made a will, as the other two witnesses, *Ford* and *Damerell*; but said, that she did not remember that *Damerell* and *Ford* were present.

John Hewgoe, apothecary, deposed that in July and August 1766, *Elizabeth Caunter* was very infirm, feeble and dropical, that he bled her in bed on Saturday the 2d of August; that she kept her room Sunday and Monday the 3d and 4th of August, and that on the 5th she came down stairs, but was so very weak, that she tottered as she walked over the room. That he did not see her after, for three or four days. That he thought she could not travel on horseback, but she might walk a little way in the street, and not more than half a quarter of a mile, and that she was confined by illness to her bed till her death on the 21st of September. This witness refreshed his memory, by having recourse to his day book.

Several of the witnesses proved, that *Michael Salter Ashe* and his wife lived together with great harmony and affection.

Observations on the positive Testimony.

By the evidence thus given on the behalf of the appellant, every part of the respondents story, insisted upon in support of the will, is contradicted. It is shewn to be in the highest degree improbable, or rather impossible, that the will should have been drawn by *Mr. Paull*, or engrossed or executed under his directions. The will is long and particular; a draft of it must have been made before it was

negative proof, that *Matthew Andrew Paull* never made the will; the several declarations of *Elizabeth Caunter*; the internal

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copied for execution. Neither his papers or his accounts discover any trace of it. It is not copied by any person ever employed by him, or known in the country where he lived. His clerk, whom he entrusted in all his business, never heard of it.

The execution of the will at the time fixed, is disproved by the fullest and clearest testimony. *Josias Salter* is positively proved, by the evidence of *Josias Rogers* and his wife, not to have moved from the *Barnstable Inn*, to which he came to be tapped for his dropsy, either on the 7th or 8th of *August*; on the latter of which days, the supposed execution of the will is fixed by *John Melhuish*. *Elizabeth Caunter* is proved by various witnesses, not to have been at *Exeter* during the week in which the *Lammas* fair was held. The infirmities and sickness under which she then laboured, enable the witnesses to speak with the greatest accuracy and certainty.

If therefore the cause was to be decided by the *positive testimony* only given on each side, without attending to the circumstances of the case, it is at least equally strong on the part of the appellant; and a jury might very satisfactorily decide upon it, that the will was not executed by the supposed testator. But when in addition to this testimony, the *circumstances* are considered, they leave no room to doubt that the will is a forgery.

Observations on the Will, and the Indorsement on its Cover.

The indorsement on its cover, by which it is directed, that the pretended will shall not be opened till three months after the supposed testator's death, affords abundant matter for observation. It is not to be reconciled with the expedition required by the supposed testator, for the payment of his debts, legacies and funeral expences. It is absolutely inconsistent with the directions given for his burial.

Supposing this to be the true and genuine will of *Michael Salter Ashe*, no reason can be assigned for making this indorsement: Supposing it to be false and forged, it may be easily accounted for. It was necessary for the framer of the will, to furnish some plausible excuse for the delay in not producing it immediately after the decease of Mr. *Ashe*; and he was induced to insert the clauses in the will, which were inconsistent with the indorsement on the cover, in order to give an air of probability to the will itself. This diversity of intention, naturally produced the inconsistency which evidences the fraud. It cannot be presumed, that Mr. *Ashe* directed the indorsement; nor is it less absurd, or less inconsistent with the course of business, to suppose that *Paull* should direct the person who ingrossed the will, to indorse the cover. It is admitted, that the engrosser of the will was not present at the supposed execution of it; and the respondents affect to trace the will from the *Black's Head*, into the hands of the respondent *Hite*, who produced it to *Hannah* *Ashe*; and still they have not attempted to point out the time when the in-

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nal evidence of the will itself, and the indorsement on the cover; all concurred in demonstrating this proposition, that the pretended

dorsement was made; neither is it pretended to have been written by any person connected with the supposed testator, or by Mr. *Paull*, who is by the respondents supposed to have made the will, or by any person whose hand writing was ever before seen; though it is indisputably the same with the hand writing of the will, which is very remarkable, and wrote by some old person; and if *Paull* had prepared the will, some traces of it would have been found in his office, and known to his clerk; and the writer must have been discovered, if the transaction had been genuine. It is also very extraordinary, that *Paull* should read over the will, and immediately inclose it in a cover, with an indorsement so very inconsistent with the directions contained in the will itself, and that the testator and the other two witnesses should none of them discover it; for if *Vicars* be credited, they were all present at the reading and executing of the will, and *Paull* himself sealed it.

A very long interlineation appears in the will, of which no notice is taken in the attestation. This is very singular; it is still more so, when it is considered, that the will appears to be attested by Mr. *Paull*, an attorney of great accuracy, who would not have omitted to remark such an interlineation.

The extreme hardship and severity with which the widow of the supposed testator is treated in this will, is foreign to his known character, and to the current of his affections. It was proved at the trial, that he lived with his wife in the most perfect harmony for a great number of years, from his marriage till his death, and had experienced during that time great vicissitudes of fortune, being sometimes involved in extreme poverty, and at other times in good circumstances.

The annuities are merely colourable, and inserted with a view of giving a plausible appearance to the will, and of preventing the annuitants from countenancing the appellant, in disputing the validity of the pretended will.

The intails in the will are artfully drawn, so as to secure, at all events, the remainder in fee to the respondent *Jane Ramsay*; for, at the death of Mr. *Ashe*, the appellant *Ann Salter* was upwards of 46 years of age, and to prevent even a possibility of issue to inherit, there is a very artful clause inserted in the will, that the person marrying her should not have any benefit from the estates; the trustees being directed, in that event, to manage the estates, receive the profits, and pay them into her own hands. The next in remainder is *William Salter*, lately dead, who was a married man, then aged 51 years, and had issue only one daughter, aged 23 years, who cannot take under the will, the limitation in tail being only to his sons.

The wife of *William Salter* being then upwards of 50 years of age, there was no probability of her ever having any heirs male to inherit. If the limitations to *William Salter* had not been carefully varied from the antecedent and subsequent limitations, which extend to the issue female, an estate tail would have vested in the daughter of *William Salter*, who, as soon as she came into possession of the pre-

pretended will was never executed by *Michael Salter Ashe*, nor drawn by *Matthew Andrew Paull*, nor attested by any of the persons whose

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wives, might have suffered a recovery, and have barred the subsequent limitation to the respondent *Jane Ramsey*. The widow of Mr. *Ashe* was then upwards of 51 years of age, and *Margaret Salter* was upwards of 56 years of age, and unmarried; so that the remainder in fee is well secured to the respondent *Jane Ramsey*, there being scarce a possibility that any antecedent estate tail will vest in the issue of the former devisees. The interest of the respondent *Jane Ramsey* at first view appears to be precarious and of small value; but on examining the probable duration of the prior limitations, the expectancy is certain and of considerable present value; besides, it is unaccountable why Mr. *Ashe* should omit the name of *Josias Salter*, in the limitation of the estate, when he hath inserted all the others who stood in the same relation to him.

It is not in proof, that the supposed testator had any affection or esteem whatsoever for the respondent *Jane Ramsey*; but the expressions of kindness contained in the pretended will, and the proof adduced on the part of the respondents, are applied to the affection and esteem which it is contended Mr. *Ashe* entertained for *Francis Hite*. The daughter, who was utterly unknown to Mr. *Ashe*, is the apparent object of his bounty; though this devise is not contended to have been made with an intent to aggrandize the family of the *Hites*, but merely to pay a debt of friendship. It must therefore remain the subject of conjecture, why the name of *Jane Ramsey*, rather than of *Francis Hite*, should grace this will as the devisee of the real estate. It must be admitted, that *Francis Hite* shewed some marks of friendship, and offered some small relief to Mr. *Ashe* in his poverty and distress; foreseeing probably the event which happened, that the estate in question would soon fall to him by the expiration of some antecedent limitations. He was accordingly employed by Mr. *Ashe*, as his attorney and agent, on the acquisition of his fortune, to receive his rents and manage his affairs. Anxious care is taken in the pretended will, that *Hite* shall never be called to an account for monies received by him as bailiff or steward, to whatever amount that might be, at the time of the testator's decease.

The death of the three attesting witnesses in the life of the supposed testator, within a year after the execution of the pretended will, is extraordinary. But it is still more extraordinary and more unaccountable, that *Paull*, a sensible, judicious and accurate attorney, much conversant in business, should permit two persons, then in a dying condition, to attest the will of a man in good health, and that for the purpose they should be brought from *Crediton*, the distance of eight miles, when in the populous city of *Exeter*, witnesses might have been had in abundance to this transaction.

If secrecy from Mrs. *Ashe* was the motive, the time of execution, as well as the choice of witnesses, was very extraordinary; for Mrs. *Ashe* comes with the testator and her brother to *Exeter*, and the will is said to be attested by Mrs. *Caunter* an intimate friend, and *Josias Salter* a brother of Mrs. *Ashe*, the latter of whom must know he should be totally destitute of the necessaries of life if he survived Mr. *Ashe*; and

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whose names were set thereto as subscribing witnesses. That the only ground on which it was contended the will ought to be

and the choice was also the most unfortunate, because *Caunter* and *Josias Salter* are supposed studiously and anxiously to declare the business in which they had been employed, to every person they happened to meet.

The weakness and the infirmities of both *Elizabeth Caunter* and *Josias Salter*, at the time fixed for the execution of the will were such, that it was absolutely impossible for either of them to have walked about the streets of *Exeter*, in the manner described by the respondents witnesses; but it is probable, some of them might see *Elizabeth Caunter* at *Exeter* on the 4th of *July*, which was certainly the last time of her being there.

Some additional testimony was adduced by both parties at the last trial, which merits observation. It was much insisted on by the counsel for the appellant at the former trial, and at your Lordship's bar, that it was impossible for *Elizabeth Caunter*, weak and infirm as she was, to be conveyed from *Crediton* to *Exeter* without a carriage, and without a companion; and that although *Michael Salter* *Aphe* died within a year after the date of the supposed will, the authenticity of which was immediately questioned, no evidence had been given of any carriage that was hired for that purpose, or of the person by whom she was attended, nor any conjecture formed of the manner in which she came.

Mary Cookeley, a witness examined at the former trial, for the first time deposed, that *Elizabeth Caunter* declared to her, that she came to *Exeter* on horseback, but who attended her, where the horse was hired, or where it was put up at *Exeter*, is still a secret, and must ever remain so, unless the memory of this or of some other witness, should hereafter be so much improved as to recollect these circumstances. This witness could give no reason for her new additional recollection, which had never occurred to her on her former examinations at the first trial. And upon the commission from the Court of Chancery, two new witnesses were examined on the part of the respondents, namely, *Elizabeth Saunders*, whose evidence was too slight and insufficient to merit any attention, when opposed to the clear and concurrent testimony of the other witnesses, who were the constant companions of *Elizabeth Caunter* in her last illness: And *Alice Morris*, whose evidence is owing entirely, according to her own account, to her overhearing, most providentially, a conversation between *Hite's* writer and the ostler at the *Turk's-head*; but it is utterly incredible, that this witness living at *Exeter*, next door to the *Turk's-head*, the supposed scene of action, which was kept by *Vicars* and his family, should never have heard of this transaction until within two months before the last trial; and then, at the distance of eight years, should perfectly recollect the time of seeing *Elizabeth Caunter*, without circumstances which might naturally refresh her memory. It is to be remarked, that *Elizabeth Caunter* is admitted by all parties, to have been at *Exeter* on the 4th day of *July* in the same year, which might possibly lead this woman into some mistake, concerning her being at *Exeter* in the summer of that year.

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be established was, that otherwise several witnesses produced by the respondent *Ramsay*, must be guilty of perjury; but it was on the other hand equally clear, that if the will was to be established, several witnesses produced by the appellant must be deemed guilty of perjury; as it was impossible on any supposition, to reconcile their testimony to the case insisted upon, and attempted to be proved by the respondents. That the positive testimony of the witnesses being thus contradictory, no criterion remained by which the cause could be rationally determined, but the circumstances of the case; and these most wonderfully concurred to disprove the pretended will, and indeed rendered it impossible to believe this will to be genuine, without believing facts to have existed in the present case, which never before existed in any human transaction. That the only reason urged for granting a new trial was, that as there were now two opposite verdicts, one in favour of the will, the other against it, there was no foundation for the Court of Chancery to decree either for or against the will. But to this it might be answered, that the verdicts were founded on different facts. The book of accounts kept by *Paull* was not produced on the first trial, and the non-production of it was urged with weight to the jury, on the behalf of the respondents; but on the second trial this book was produced. The *alibi* of *Josias Salter* was not positively proved on the first trial, but on the second it was proved with the greatest clearness and precision. The two verdicts were therefore in effect not contradictory, being the result of different evidence; and the jury who

On the part of the appellant, the *alibi* of *Josias Salter* was not clearly proved at the former trial. It was a fact well known to the parties in the cause, that *Josias Salter* came to *Exeter* on the 7th of *August*, 1766, in order to be tapped for the dropsy: But it was not till the first trial, that the respondents absolutely fixed the time of the pretended execution of the supposed will, when *John Melhuish*, the clerk of the respondent *Hite*, in order to give credit to his story, affected to ascertain the time precisely, by his assisting at an arrest made at *Exeter*, by the order of his master. This clue led to a discovery of the evidence which has clearly established the *alibi* of *Josias Salter*. The books of *Matthew Andrew Paull* were produced for the purpose of shewing, that he made no entries therein of any money received for the business supposed to have been done by him, relating to the will in question. The result of this new evidence has clearly added great strength to the case of the appellant, and it is material to be attended to, as it distinguishes the cases on which the two verdicts have been given in this cause, and renders them in effect reconcileable to each other; and if they could not be considered as reconcileable, would afford a very good reason for preferring the latter.

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gave the first would probably have given the second, if they had heard the subsequent evidence. Besides, when the two verdicts were compared, the last must derive weight from the very circumstance of its being the last. When after one trial, parties proceed to a second, the cause is better understood; the parties are fully acquainted with the merits of their own case, and of that of their adversary; and are better prepared to support the one, and combat the other. In this case too, the second verdict had an advantage from being given by a *full* special jury, whereas the first was the verdict of a common jury, with the assistance of only three special jurors. That the last verdict was in itself perfectly satisfactory; no objection could be made to it; and it concurred with and confirmed those suspicions, which their Lordships entertained when they ordered a second trial. Those suspicions induced their Lordships to think, that the first verdict was not satisfactory, and that the cause ought to undergo a second examination by a jury. And as upon such second examination, a jury had given a verdict contrary to the former; to determine that the second verdict was not a satisfactory decision of the question, was in effect to say, that the question could never be satisfactorily decided.

E. Thurlow.
W. Davy.
J. Brown.
F. Buller.

On the part of the respondents it was contended, that all issues of this kind are directed to inform and satisfy the conscience of the Court by which they are directed; and where, as in the present case, two different verdicts are found upon the same evidence, it is almost of course to grant a third trial; for otherwise, it is scarcely possible for the conscience of the Court to be satisfied: And when two verdicts are contradictory, one does not merit more credit than the other. That the weight of evidence on both trials, and particularly on the last, being in favour of the will, the second verdict must, in that respect, be considered as contrary to evidence; which has always been held a good ground for granting another trial. That the facts in this case being both numerous and complicated, it seemed highly expedient, for the quiet and satisfaction of the contending parties, that they should again be examined into, and finally discussed, in the most solemn manner that the constitution of this kingdom will permit. And though the great expence attending this mode of discussion, formed the appellant's only solid objection to it, yet the force of that objection was obviated by the respondents hav-
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ing consented to take only *nisi prius* costs, in case another verdict should be found in their favour.

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After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the orders therein complained of, should be reversed.

ORDERS
reversed.
M. S. Jour.
sub anno 1775.
p. 138.

Philip Thickness, Esq; administrator of
his late wife Mary Ann Elizabeth,
and also administrator of Joyce Thick- } Appellant. Case 20.
ness, deceased, his daughter, - }

Peter Liege, William Jousfelin and others, Respondents.

16th February, 1775.

PETER LEWIS BERRENGER, being seised of a small real estate of the yearly value of 8*l.* and possessed of a considerable personal estate, made his will, dated the 29th of May 1731, and thereby appointed Daniel Gobbe and Paul Girandean his executors: And, after giving some small legacies and annuities, he gave and devised in the following words; viz. "I dispose of all
"and singular the rest, residue and remainder of my estate in
"lands, houses, tenements, monies, annuities, securities, goods,
"and chattels whatsoever, as follows, that is to say, I give and
"devise all the said rest, residue and remainder of my said estate,
"to my said executors, in trust to place the same out at interest,
"as the same shall be by them received, as soon as the same shall
"come to their hands, upon such funds and securities as they
"shall think fit. And I will, that the interest money, and the
"rents of my houses, lands or tenements, which my executors
"shall receive, be likewise placed out at interest, except only if
"it happen that my daughter survive her said husband, for
"then my will is, that my said trustees pay to her every year
"during her natural life, all the interest of the rest, residue and
"remainder of my estate, and of the increase thereof, by in-
"terest, rents or otherwise; and that after her decease, they
"divide equally share and share alike amongst her issue, all the said
"rest

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“ rest and remainder of my estate, and the increase thereof; but
 “ that division to be only when the youngest of them shall be
 “ 21 years old; and if any of them be then dead, and hath left a
 “ lawful issue, then my will is, that the guardian of that lawful
 “ issue may receive his share. But if my daughter happen to
 “ die without any child, or the youngest of them should not
 “ arrive to 21 years, and none of them shall have left lawful issue,
 “ then my will is, that the remainder of my estate, and all the
 “ increase thereof be divided into four equal parts, whereof I
 “ give and bequeath one fourth part to *Peter Liege*, a surgeon.
 “ And I give and bequeath one other fourth part to *Wil-*
 “ *liam Jouffelin* a jeweller, and to *John Jouffelin* his brother, a
 “ confectioner. And I give and bequeath one other fourth part
 “ to the children of *John Pomarede* and *Mary Benigne* his wife,
 “ of *Dublin*. And I give and bequeath one other fourth part to
 “ *Charles Benjamin Jeffries*, son to Captain *Latouche* of *Chelsea*.
 “ And if it should happen, that when this article should take
 “ place, that one of the four donees were dead, (for I consider
 “ *William Jouffelin* and his brother *John* to be but as one single
 “ donee, and so likewise of the issue of *John Pomarede* and
 “ *Mary Benigne* his wife, as one single donee) and had left no
 “ lawful issue, then my will is, that his share be divided equally
 “ among the surviving donees.

The testator also made a codicil to his will, dated the 8th of
November, 1731, in the words following, viz. “ Whereas there
 “ is a clause in my will bearing date the 29th day of *May*, 1731,
 “ in manner following, viz. but if my daughter happen to die
 “ without any child, or the youngest of them should not arrive
 “ to 21 years, and none of them shall have left lawful issue,
 “ then my will is, that the remainder of my estate and all the
 “ increase thereof, be divided into four equal parts, whereof I
 “ give and bequeath one fourth part to *Peter Liege*, &c. to alter
 “ which clause, viz. of dividing it into four parts, the design
 “ and intent of this codicil now annexed to the said will is, that
 “ my said estate (that is the remainder thereof, as aforesaid) be
 “ and shall be divided into five equal parts, whereof my will is
 “ hereby declared, that the children of my niece *Querqui de*
 “ *Chalais*, shall be accounted as one of the five donees, and shall
 “ have one fifth part; and the other donees in my said will men-
 “ tioned, shall have one fifth part of the said remainder of my
 said

“ said estate, as before the codicil was made; the said *Peter Liege*
 “ not being hereby excluded, but to continue as before one of
 “ the said donees; and I do confirm every other part of my said
 “ will, not hereby altered.

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The testator died in *November, 1731.*

At the time the testator made his will and also at his death, his daughter *Mary Ann Elizabeth*, then the wife of Mr. *John Lanove*, had issue one daughter about six years old, also named *Mary Ann Elizabeth*, her only child, to whom the testator stood Godfather, which granddaughter afterwards intermarried with the appellant, and died on the 19th of *March, 1748*, having had issue by him four children, who all died infants; but three of them survived her, and *Joyce* her last surviving child, died on the 29th of *June, 1752*, being then an infant of about five years old, and all the children, as well as their mother, died in the lifetime of Mrs. *Lanove*, and all of them except *Joyce*, in the lifetime of Mr. *Lanove*.

In *January, 1749*, the said *John Lanove* died, and his widow then becoming entitled by virtue of the will of Mr. *Berrenger*, to the interest of the residue of his estate, and the increase thereof for her life, exhibited her bill in the Court of Chancery, in her own name, and in the name of the said *Joyce Thicknesse* her granddaughter, against her father's executors, for an account of his personal estate, and the rents and profits of his real estate; and that what had accrued due thereon before her husband's death, might be placed out at interest pursuant to the will; and that the interest and income of what had accrued due since, or should thereafter accrue during her life, might be paid to her, and that the trusts of the will might be carried into execution, and the title deeds left with the Master; and that the then surviving executor *Daniel Gobbe*, might be decreed to act, or assign his trust, and that proper directions might be given for carrying the trusts of the will into execution.

To this bill all the defendants put in their answers, and the cause being at issue was set down for hearing; but before it came on, the said *Joyce Thicknesse* the infant died, and the appellant having obtained administration to his said daughter, as also to

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his said late wife, Mrs. *Lanove*'s daughter, and claiming, as such administrator, to be entitled to the residue of the testator's estate, expectant upon the death of Mrs. *Lanove*, as an interest vested in his wife, or daughter, and the respondents the donees named in the testator's will, claiming title to such residue expectant as aforesaid, in case Mrs. *Lanove* should die without leaving any child living at her death; she in *March* 1753, exhibited her supplemental bill, against the said *Daniel Gobbe*, and the executors of the deceased executor, and also against the appellant, and the persons named as donees in her father's will; thereby stating, as supplemental matter, the death of her granddaughter *Joyce Thicknesse*, and the claims of the appellant and the respondents the donees, as also the death of *Charles Benjamin Jeffries*, one of the original donees, without issue; and praying, that her rights and interests, and those of all other parties, if any, in or to her said late father's real and personal estates, might be established and determined, and secured to them; and that the title deeds, evidences and writings concerning the same, might be preserved for her benefit, and the benefit of such other persons as should be interested therein at her death.

The defendants severally put in their answers to the supplemental bill. And the appellant by his answer insisted, that having intermarried with the testator's granddaughter, the said *Mary Ann Elizabeth*, the daughter and only child of the plaintiff Mrs. *Lanove*, and she having attained the age of 21, and afterwards dying, having had the said *Joyce* her daughter, who was also dead, he as husband to his said deceased wife, and next of kin to his said daughter *Joyce*, had obtained administration to them, and that by virtue of the testator's will, his late wife, or the said *Joyce* her daughter, as the surviving lawful issue of her mother, had a vested interest in them, or one of them, in the said real and personal estates, and that the same was then vested in him, and that he had a right thereto, expectant on the death of the plaintiff Mrs. *Lanove*.

The defendants the donees, by their answers, submitted to the Court, that in case the plaintiff should die without any child or issue living at her decease, they would be entitled to the several shares following in the residue of the testator's estate, viz. the respondent *Liege* to one fourth; the respondents *William Jousse-*
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lin and *John Jouffelin* to one fourth; the respondents the children of *John Pomarede* and *Mary Benigne* his wife to one fourth; and the respondents the children of the testator's niece *Querqui de Chalais*, to the remaining fourth part.

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On the 20th of *July*, 1754, the cause came on to be heard before the Lord Chancellor *Hardwicke*, when his Lordship was pleased to give the usual directions for taking the accounts of the testator's personal estate, and to order that the capital thereof, and the interest and profits down to the death of *John Lanove*, should be paid or transferred to the Accountant General, and continued or placed out at interest in his name, in trust in the cause; and the interest and income of the real and personal estate accrued since the death of *John Lanove*, and the future interest and income which should accrue during her life, were ordered to be paid to the then plaintiff *Mrs. Lanove*; and after her decease, any of the parties, or any other person who might be interested in any part of the testator's personal or real estate, according to the contingencies in the will, were to be at liberty to apply to the court concerning the same, as they should be advised, and all further directions were reserved.

The accounts were accordingly taken, and the clear residue of the testator's personal estate, and the interest and profits thereof to the death of *Mr. Lanove*, were transferred into the Accountant General's name, and invested in 2049*l.* 2*s.* 9*d.* three *per cent.* consolidated Bank annuities, 3058*l.* 5*s.* 8*d.* three *per cent.* Bank annuities of the year 1726, and in three several Exchequer orders, amounting to 75*l.* *per ann.*

Mrs. Lanove died on the 29th of *December*, 1772, having received the interest, income and profits of the clear residue of the testator's personal and real estates, which accrued due in her lifetime.

In *Hilary Term*, 1773, the respondents exhibited their supplemental bill against the appellant, stating the former proceedings, and the death of *Mrs. Lanove*, having made her will and appointed the respondents, *Isaac John Barnouin*, and *John Briault* who died in her lifetime, executors thereof; and that *Mrs. Thicknesse*, the appellant's late wife, was six years of age at the time

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time her grandfather made his will, and that he well knew at the time he made his will and codicil, that his daughter Mrs. *Lanove* had a daughter living, namely the said *Mary Ann Elizabeth*, who afterwards married the appellant, and that he was one of the Godfathers to his said granddaughter in baptism; and therefore this bill prayed, that the rights and interest of the plaintiffs, and the other parties, might be established and determined by the Court, and that they might have the benefit of the former suit and proceedings.

The appellant by his answer to this supplemental bill, admitted, that at the time the testator made his will and codicil, the said *Mary Ann Elizabeth Lanove* his daughter, had a daughter named *Mary Ann Elizabeth* then living, an infant of tender years, who afterwards became the wife of the appellant, and having attained the age of 24 died; and stated, that he had obtained administration to her, and the three children who survived her, and that in one or other of those rights, he claimed to be entitled to the whole residue of the testator's real and personal estate.

The cause came on to be heard on the 11th and 12th of *March*, 1774, before the Lord Chancellor *Bathurst*; and on the 21st of that month, his Lordship was pleased to declare, That on the true construction of the testator's will, the devise over had taken effect, and ordered the three Exchequer orders remaining in the Bank, on the credit of the cause *Lanove* against *Gobbe*, to be delivered out to Mr. *John Henley*, and sold with the privity of the Accountant General, and assigned by him to the respective purchasers thereof, and the money arising from such sale to be paid into the Bank, to be placed to the account of the cause: And that one fourth part of the 2049*l.* 2*s.* 9*d.* three *per cent.* consolidated Bank annuities, and 3058*l.* 5*s.* 8*d.* three *per cent.* Bank Annuities of the year 1726, standing in the name of the Accountant General, in trust in the said cause, and of the interest accrued thereon since the death of *Mary Ann Elizabeth Lanove*, and to accrue thereon until the transfer; and of the money to be raised by sale of the said Exchequer annuities, and the payments accrued thereon during the same period, and to accrue thereon until the sale, should be transferred and paid to the respondent *Peter Liege*; and one other fourth part thereof to the respondents *William Jouselin* and *John Jouselin*, in equal moieties

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moieties; and declared, that the respondents *Daniel Pomarede* and *Mary Armengau*, with the respondents, *Samuel Pritchard* and *Ann* his wife, *Jacob Lacam* and *Harriet* his wife, in right of their respective wives, were entitled to one other fourth part thereof in equal shares; and ordered, that one fourth part of such fourth part, should be transferred and paid to the respondent *Daniel Pomarede*, and one other fourth part of such fourth part to the respondent *Mary Armengau*; but before the transfer and payment of the remaining two fourths of such fourth part, belonging to the respondents *Samuel Pritchard* and *Ann* his wife, and *Jacob Lacam* and *Harriet* his wife, in right of their wives, the said respondents, the husbands, should respectively lay before the Master, such settlements as they had made, or proposals for such settlements as they intended to make on their said wives, and the issue of their marriages respectively, and the Master was to enquire whether the same were reasonable and proper or not, and was to state the same, with his opinion thereon, to the Court, whereupon such further order should be made relating to the transfer and payment of their respective shares, as should be just. And it was ordered, that the remaining fourth part of the said Bank annuities and interest, and of the money to be raised by the sale of the said Exchequer annuities, and of the payments accrued and to accrue thereon as aforesaid, should be divided into thirds, and one third part thereof be transferred and paid to the respondent *John Alexander Querqui, Sieur de Chalais*; and one other third part thereof, to the respondent *James Augustus Querqui, Sieur du Chatelier*; and the remaining third be subdivided into moieties, and one moiety transferred and paid to the respondent *Jane Margaret Petitpierre*, and the remaining moiety to the respondent *Ann Elizabeth Petitpierre*; and it was further ordered, that 18*l.* 15*s.* which accrued for one quarterly payment on the said Exchequer annuities, in the lifetime of *Mary Ann Elizabeth Lanove*, should be paid to the defendant *Barnouin* her executor; and that all parties should be paid their costs to be taxed, out of the aforesaid funds.

From this decree the appellant appealed; and on his behalf it was contended, that the residue of the testator's personal estate vested absolutely in Mrs. *Thicknesse*, on her attaining her age of 21, subject to her mother's right to receive the produce for her life; and though she died in the lifetime of her mother, it was transmitted on her death to her administrator; because a limitation

E. Thurlow.
A. Wedderburn.
J. Madocks.

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tation of personal property to a party, gives a right to his executors and administrators, whether they are named in the instrument or not. And therefore, if a legacy be given to *A.* for life, and after his death to *B.* without saying to his executors or administrators, yet the executors or administrators of *B.* shall take the legacy, though *B.* die in the lifetime of *A.* That this residue vested in Mrs. *Thicknesse* upon her attaining 21, both by the act of the law, and the intention of the testator. It appeared, that the testator had taken some offence against his son in law Mr. *Lanove*, and therefore directed the produce of the residue to accumulate to the principal, during the joint lives of Mr. *Lanove* and his wife. If she should survive, he intended that she should be let in to the benefit of the produce for her life, but whether she should survive her husband, or die in his lifetime, his grandchildren were the first and main objects to whom the capital should belong, whether their mother's accidental interest in the profits should take place or not; and his collateral relations, to whom he gave it over, were only his secondary objects, in case the first should fail. Accordingly, having given the whole residue to his executors, upon trust to accumulate (except in the case of his daughter surviving her husband, in which case he directed, by way of exception, that she should be let in to the produce for her life) he directed, that after her death, the fund itself should be equally divided among her issue, meaning her children; as was evident from his afterwards directing, that the issue of such issue should stand in *loco parentis*, and also from the devise over, where he used the term *child*, in describing the reverse of the contingencies under which the issue were to take. Having directed that the fund should be divided among her children, he then appointed the time when such division should be made, *viz.* when the youngest of them should attain 21; and as the elder children must have attained that age before the younger, he of necessity intended by that direction, that the children who should be entitled to shares, should be such as had attained 21. But as it might happen, that before the youngest should attain 21, some of the eldest might be dead, leaving children; he therefore directed, that if any of the children should be dead when the youngest should attain 21, and had left a lawful issue, the guardian of that lawful issue might receive his share for the benefit of such issue; presuming, that when the youngest should attain 21, if an elder child was then dead, leaving a child, such child would be under age. Here

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the gift to the grandchildren concluded; and the intention of the testator was evident, that each of them should be entitled, when the youngest should attain 21, to a share of the residue, in case none of them died before that time leaving issue; and in that case, the issue was to stand in the place of the parent. There was no difference between the case of Mrs. *Lanove* the mother, being then living or dead; save only, that in one event the grandchildren would become entitled to an interest in possession, and in the other to a future interest to come into possession upon her death. An interest actually accrued, to which a party is entitled, whether it be a right in present possession, or a right to come into possession upon the happening of a future event, is an interest vested. It is assignable, it is transmissible to an administrator, it is deviseable by will, and passes to an executor. In the present case, Mrs. *Thicknesse* attained her age of 21, in the lifetime of Mrs. *Lanove*; she was the only one of Mrs. *Lanove*'s children who did attain that age; consequently the youngest who attained 21; and upon her attaining it, she took a right to the whole fund, subject to the claim of her mother to receive the profits for her life. It was therefore vested in Mrs. *Thicknesse*, and transmissible to her administrator, as effectually as if the testator had said, "that when the youngest of Mrs. *Lanove*'s children should attain 21, the fund should be divided among all the children, their executors and administrators;" for being personal property, the gift alone imports its being so transmissible. This interest could not be divested out of Mrs. *Thicknesse*, but by some express provision in the will for that purpose. There was no divesting clause in the will, but there was a clause giving it over in case it should never vest; and this clause fortified the intent of the testator in the former, for that clause must of necessity import the reverse of the contingencies, upon which the grandchildren were to take an interest. The fund was to be divided among all the children, when the youngest should attain 21; and if any of them should be then dead, leaving issue, such issue was to stand in the place of the parent: The reverse of this was, *if there should be no child, or if they should all die before the youngest should attain 21, and none of them should leave any issue, then the persons in remainder should take*; and accordingly the words were, "but if my daughter happen to die without any child, or the youngest of them should not arrive to 21 years, and none of them should have left lawful issue, &c."

But

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But it was objected, I. That the vesting was postponed till after the death of the mother. II. That the words, "but if my daughter happen to die without any child," meant a *child living at her death*. III. That the time of payment was annexed to the gift, and therefore it was not vested till the time of payment came.

In answer to the first objection it was said, that there was nothing in the first disposition to suggest any such intent, but the words, *and that after her decease they divide, &c.* But these words were only consequential upon the gift of the produce to Mrs. *Lanove* for her life, and did not point out the time when the capital should vest; for if it were otherwise, there never could exist a case, where an interest could vest during the life of the tenant for life, since these words are always used. In personal as well as real estates, where any thing is given to one for life, and from and after his decease to another, both the present and future interest vest at the same time; it is an effect which the law has given to such limitation, and is an established rule of property in *England*. That to postpone the vesting till the death of the mother, would produce a consequence directly contrary to the will; for it would produce a survivorship among the children after they had attained 21, in case any of them should die above that age without issue; for the testator gave the fund to all the children expressly, when the youngest should attain 21, *i. e.* when they should all be 21. Therefore every child attaining 21, and in being at the time when the youngest attained that age, should have a share; but if the vesting was postponed till the death of the mother, those who died in her lifetime before the youngest attained 21, would not have any share, but the whole would go to such child or children as should survive the mother, notwithstanding the testator had by express words given it to all who should attain 21.

To the second objection it was answered, that the words used in this sense overturned the former part of the will; for though the testator had directed the fund to be divided among all the children who should attain 21, this sense of the words would make it divisible among such only as should survive the mother; but the natural sense of the words, applied to the case to which they were opposed, was, if Mrs. *Lanove* should

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not have a child. The first disposition was to the issue or children; the first alternative therefore, was the not having children. The second direction being to divide when the youngest should attain 21; the second alternative therefore was, if the youngest of them should not attain 21. The last disposition was, that if any of the children should die leaving issue, then to the guardian of the child; and therefore the third alternative was, if none of them should have lawful issue. The will did not take notice that Mrs. *Lanove* had any child, and therefore the natural sense of the words was consistent with the tenor of the will. But to add the words *living at her death*, some intent must be collected from the will, as a ground for it; but all the parts of the will spoke the contrary. To the construction of those words, might be opposed the words which follow, *none of them shall have left lawful issue*; Mrs. *Thicknesse* did leave lawful issue, and therefore the fund could not go over, by the letter of the will.

In answer to the third objection, it was said, that the time of division was annexed to the gift, *i. e.* the time when the share of each child was to be ascertained, namely, when the youngest should attain 21, but the time of payment was not annexed to the gift; for no passage in the will declared, that the fund should be paid to the several children when the youngest should attain 21. Had there been two children, and both had attained 21, it is clear, that when the younger attained 21, the shares would be ascertained; for the two children would be absolutely entitled to the fund in moieties, subject to the mother's right to take the interest for her life. Mrs. *Thicknesse* therefore having attained 21, and having neither brother or sister who did attain that age, or left issue, she, as being the only child, was the youngest who attained 21, and upon attaining that age, the whole fund belonged to her, subject to her mother's interest for life. Add to this, that the appellant not only represented his wife, but his children who survived her; and who, if it had not vested in their mother, must have taken it according to the proviso of the will, had the vesting been postponed to the mother's death; because the will provided, that if the parent died before the time of vesting, the child should take.

On the other side, it was said, that it appeared to be the manifest intention of the testator, to be collected from the whole

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C. Sayer.
J. Hett.

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tenor of his will, that all the limitations of the beneficial interest in the residue of his estate, should be *contingent*; and that no person should take any transmissible share of it, before his or her right of enjoyment in possession took place. He meant first to provide for his daughter, upon the contingency of her surviving her husband, and afterwards, for such of her issue as should be living at her death; and if there should be none such, then for such of his relations named in his will, or their issue, as should be then living. He did not, in any of the clauses in his will, make use of the words *executors* or *administrators*, or any other words which denote a legal representation, or a transmission of a vested legacy; but always used words of substitution, introducing the issue in the place of the deceased parent, and one donee, or set of donees, in the room of another; and this intention was not contrary to the rule of law, as the legacy must vest on the death of a person then in being. That the words, *if my daughter happen to die without any child*, which introduced the bequest over, could not mean if she happened to die *without ever having had* any child; for that event he knew could not take place, she having a child living at the time he made his will; and it would be absurd to suppose, that the testator intended to devise over his estate, upon a contingency which he knew could not happen; the words must therefore mean, *if my daughter die without any child living at her death*. If the residue of the testator's estate immediately vested in the child of Mrs. Lanove then born, subject to her life interest, it would make the gift over to the several donees nugatory in its creation; but that he meant *such* issue of a deceased child of his daughter should take, as should be living at Mrs. Lanove's death, appeared by his directing that the guardian of such issue, if under age, should receive his share. If any thing vested in Mrs. Thicknesse, it must have vested in her immediately upon her father's death, as a remainder expectant upon the death of Mrs. Lanove; but at the time when Mrs. Thicknesse died, *her father being then alive*, nothing had vested in Mrs. Lanove her mother, and consequently nothing could have vested in the daughter; it being absurd to say, that the remainder vested before the particular estate. And if Mrs. Thicknesse, or any other child of Mrs. Lanove, had taken a vested interest, it would have been transmissible to their personal representatives, if they died before her, and would not have gone to their issue; which would

would have been plainly contrary to the testator's intention. That in the present case, there was no *substantive* gift, to make it a legacy *immediately vested*, though payable at a future time; but the gift and the time of payment, were after the death of Mrs. *Lanove*; both commenced together, and the time of the gift, and of the payment or division, were the same. Lastly, that the bequest being to all the children, and all the issue of any deceased children of Mrs. *Lanove*, the *quantum* of the legacy, or of each child or grandchild's share, could not be ascertained until Mrs. *Lanove*'s death, and therefore could not be a proper object of, or any consideration for a settlement; nor was it given by the will as a *fortune* or *provision*, but only as a *general* legacy; consequently not within the reason of those cases, in which portions or fortunes provided by settlements, have been held to be vested and transmissible interests, before the time of raising them.

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After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.
M. S. Jour.
sub anno 1775.
p. 232.

Thomas Toder and Ann his Wife, - Appellants. Case 21.

Mark Sansam, and Others, - Respondents.

27th February 1775.

THOMAS GREAVES being seised in fee, amongst other estates, of a farmhouse and homestead, at *Bottisford* in the county of *Leicester*, wherein he dwelt, and possessed of a leasehold messuage or tenement and divers closes of arable land, which he held under five several leases for lives, which had been granted by the chaplains and poor of the hospital of *William Wigstone* of the town of *Leicester* of the said *William Wigstone*'s foundation, which were altogether of the yearly value of between 30*l.* and 40*l.* subject, as to the leaseholds, to reserved rents amounting to 11*l.* 5*s.* a year; made his will, dated the 18th of April 1729, and thereby, *inter alia*, gave and devised in the words following: "I give and bequeath unto my grandson Thomas
" Sansam

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“ *Sansam* and unto his heirs for ever, my farmhouse and home-
 “ stead in *Bottisford*, which I now dwell in; and also all the
 “ land and closes which I now hold under *Wigstone* hospital in
 “ *Leicester*, with all that I formerly bought of *Richard Ward*
 “ and *Francis Sumner*, to hold to him and his heirs for ever,
 “ as soon as he shall accomplish his full age of 21 years; but in case
 “ he should happen to die before the said estate shall be enjoyed by
 “ him, or attain to the years aforesaid, that then my mind and
 “ will is, that my whole estate before mentioned to return to
 “ my grandson *Richard Sansam* and unto his heirs for ever;
 “ and if he happen to die, then to return unto my grand-
 “ daughter *Sarah Sansam* and unto her heirs for ever. Item,
 “ my will and mind is, that my son and daughter *Mark* and
 “ *Ann Sansam* shall peaceably enjoy all this my whole estate
 “ beforementioned, until their sons shall come to attain the full
 “ age of 21 years, my son *Mark Sansam* paying out of the said
 “ estate 20 *l.* a year unto my loving wife, *Ann Greaves*, during
 “ her natural life.” And after giving to his grandson *Richard*
Sansam and his heirs, other lands, and to his granddaughter
Sarah Sansam and her heirs, other lands, he gave to her a legacy
 out of *Bottisford* estate in these words: “ And also 20 *l.* to be
 “ paid to her by my grandson *Thomas Sansam* out of the said
 “ estate, as soon as he shall come to accomplish his full age of 21
 “ years.”

The testator died in the year 1729, without revoking or al-
 tering his will, leaving the respondent *Robert Greaves*, his
 eldest son and heir at law; and as *Thomas Sansam*, the devisee,
 was an infant at the time of the testator's death, the respondent
Mark Sansam and *Ann* his then wife, by virtue of the testator's
 will, entered upon the farmhouse, homestead and premises,
 which were devised to *Thomas Sansam* in manner abovement-
 tioned, and continued in the possession thereof until the death
 of *Thomas Sansam* and he paid the 20 *l.* a year to the testator's
 wife to the time of her death.

Richard Sansam, one of the devisees, died an infant, and with-
 out issue, in July 1732, being then only seven years of age.

Thomas Sansam, the other devisee, died on the 15th of August
 1746, without issue, leaving the respondent, *William Sansam*,
 then an infant, his brother and heir at law, having lived to at-
 tain his full age of 21; for he was born between the hours of
 five

five and six o'clock in the morning of the 16th of *August* 1725, and died about 11 o'clock in the forenoon of the 15th of *August* 1746, when he was killed by a fall from a waggon. And on his death, the respondent *William Sansam*, as his heir at law, became entitled to the estates in question.

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Sarah Sansam, the testator's granddaughter, survived her two brothers, *Richard* and *Thomas*, and having intermarried with *Richard Lintbwaite*, had issue by him, the appellant *Ann*, and *Sarah Lintbwaite*, her only children and heirs at law, and died in *March* 1757.

After the death of the testator, and in the lifetime of the devisee *Thomas Sansam*, three of the five leases which he was entitled to, determined by the deaths of the several persons for whose lives the leasehold premises were thereby granted; and the respondent *Mark Sansam*, with his own money, purchased of the hospital three new leases of the same premises for his own benefit; and he, on the 26th of *May* 1748, surrendered these three leases to the hospital, and obtained from them two new leases, comprising all the premises contained in the three which he surrendered; and he afterwards borrowed 100 *l.* of the respondent *Snape*, on mortgage of these two leases.

In *February*, 1761, the appellant *Ann* and her sister *Sarah Lintbwaite*, together with *Richard Lintbwaite* their father, as the husband and administrator of *Sarah* the testator's granddaughter, exhibited a bill in the Court of Chancery, against the respondent *Mark Sansam* and *Ann* his then wife, and the other respondents, praying, that the will of the testator *Thomas Greaves* might be established, and that the defendants might come to an account with the plaintiffs, and that the rents and profits of the premises, which had become due in the lifetime of *Sarah Sansam*, after the death of *Thomas Sansam*, might be paid with interest to the plaintiff *Richard Lintbwaite*; and that the rents and profits thereof, which had become due since the decease of *Sarah*, might be paid with interest to the appellant *Ann* and her sister, or laid out for their benefit; and that they might be let into possession of the premises; and that the mortgage made to the respondent *John Snape* might be set aside; and that the respondents *John Snape* and *Mark Sansam* might be declared to be trustees

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in the new leases which had been obtained by the respondent *Mark Sansam*, for the benefit of the appellant *Ann* and her sister, and that the same might be assigned to them; or in case the respondent *John Snape* was justly entitled to any mortgage of the leasehold premises, that the respondent *Mark Sansam* might discharge the same, and indemnify the appellant and her sister therefrom; and that the title deeds and writings might be delivered to the appellant and her sister, or some proper person in trust for them.

To this bill the respondent *Mark Sansam* and his wife, and the other respondents severally put in their answers; and the respondent *Mark Sansam* and his wife and the respondent *William Sansam* by their answers, insisted, that *Thomas Sansam* lived to attain his full age of 21 years, and stated the times of his birth and death, as mentioned above; and they also insisted, that on his death, the freehold estates which had been devised to him, descended to the respondent *William Sansam*, as his heir at law; and the respondent *William Sansam* insisted on the benefit of the two renewed leases, which had been granted to him.

The cause being at issue, several witnesses were examined on both sides, and though the plaintiffs by their bill had stated, that *Thomas Sansam* died on the 15th of *August* 1746, yet they endeavoured to prove that he died on the 14th of that month, and examined several witnesses for that purpose, who gave some vague and loose evidence as to the fact; but the plaintiffs did not give any evidence whatsoever of the time when *Thomas Sansam* was born. On the part of the respondent *Mark Sansam* and his wife, and the respondent *William Sansam*, several witnesses proved, that *Thomas Sansam* was born in the morning of the 16th of *August* 1725, and many witnesses proved, very strongly and circumstantially, that he died on the 15th of *August* 1746.

On the 18th of *July* 1763, the cause was heard before the Master of the Rolls, when his Honour was pleased to order, that the parties should proceed to a trial at law, at the then next Lent assizes for the county of *Leicester* on the following issue, viz. whether *Thomas Sansam*, the grandson of the testator, died on the 15th

15th day of *August* in the year 1746? And all further directions were reserved till after the trial should be had.

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The respondent *Mark Sansam* and his wife, and the respondent *William Sansam*, immediately upon being served with a subpoena to appear to and answer the above bill, applied to Mr. *John Lely* of *Grantham* in the county of *Lincoln*, a solicitor of the court, and delivered to him all the necessary deeds and papers to enable him to prepare their answers, and act for them in the cause; and he undertook their defence, and acted as their solicitor from that time, until the end of *December* 1767; and on the pronouncing of the decree, he having informed them of the nature of it, and of the issue to be tried, they urged him to proceed in the trial, which he repeatedly promised to do, but he afterwards, on various pretences, declined proceeding to trial at the time appointed by the decree; but at the same time assured them, that no injury should happen to them by the delay, and that the trial should be had at the summer assizes following.

The respondent *Mark Sansam* and his wife, and the respondent *William Sansam*, for some time rested satisfied with Mr. *Lely's* assurances; but as he did not proceed to try the issue, they afterwards made application to him to proceed; and he then positively refused to try the issue. Upon this they requested him to deliver up their papers, in order that they might employ some other solicitor to act for them therein. This also he refused to do; and, about *Hilary* Term 1767, he arrested the respondents *Mark Sansam* and *William Sansam* for the remainder of his bill of costs; which they thereupon paid him; yet he still persisted in his refusal to deliver them their papers, and by those means they were disabled from proceeding to try the issue.

The plaintiffs endeavouring to avail themselves of Mr. *Lely's* neglect, on the 18th of *March* 1766, made an application to the Court, and obtained an order, that the issue should be taken as if tried and found against the respondent *Mark Sansam* and *Ann* his wife only, and procured the cause to be set down for directions upon the equity reserved.

On the 5th of *July* 1768, the cause was brought on before the Master of the Rolls, upon the equity reserved, and (no counsel

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fel appearing for either of the respondents) the Court, on the hearing, declared the will of the testator *Thomas Greaves* to be well proved, and that the same ought to be established and carried into execution; and decreed the same accordingly. And the Court declared, that the respondent *Mark Sansam* was to be considered as a trustee in the renewed leases, for the appellant *Ann* and her said mother and sister; and it was referred to the Master, to take an account of the rents and profits of the testator's estates, accrued since the death of his grandson *Thomas Sansam*, and to distinguish how much of such rents and profits accrued in the lifetime of *Sarah*, the late wife of the plaintiff *Richard Linthwaite*, and to take an account of the fines and fees paid by the respondent *Mark Sansam* on the renewal of such leases, and compute interest thereon, and such interest was to be deducted out of the rents and profits accrued since the time of such renewals respectively; and such fines and fees were to be considered as a charge on the premises comprised in the renewed leases; and it was ordered, that such of the rents and profits as accrued in the lifetime of the appellant *Ann's* mother, after a deduction of so much of such interest, should be paid to the plaintiff *Richard*, and that the rest of such rents after a deduction of so much of such interest as accrued after her death, should be paid into the Bank, in the name of the Accountant General, in trust for the appellant *Ann* and her sister; and the respondent *Mark Sansam* was to be at liberty to apply to the Court, for having what should be found due to him for such fines and fees; and the Master was to appoint a receiver of the rents and profits of the estates, and the balance was to be from time to time paid by him into the Bank, to the credit of the cause; and the appellant *Ann* and her sister, were to be at liberty to apply to the Court concerning the same; and the respondent *Mark Sansam* and his wife, and the respondent *William Sansam* were to pay the costs of the suit, so far as related to the question, whether *Thomas Sansam* lived to attain his age of 21 years; and the rest of the costs, except as to the respondent *Mark Sansam's* right to be repaid what was due for principal and interest for the fines and fees of renewals, were to be paid to the plaintiffs out of what should be coming on the account of the rents and profits before directed; and the costs which were directed to be paid by the respondent *Mark Sansam* and his wife, and the respondent *William Sansam*, were to be deducted out of what should be coming due to the respondent

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Mark Sansam on the account of fines and fees, and the interest thereof: And any of the parties were to be at liberty to apply to the Court, as there should be occasion.

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The plaintiffs proceeded upon this decree before the Master, for the purpose of getting a receiver appointed of the estates in question; and, on the 11th of *August* 1768, obtained his report of the appointment of a receiver.

All this time the respondent *Mark Sansam* and his wife, and the respondent *William Sansam*, remained totally ignorant of what passed; and from the time of pronouncing the decree of the 18th of *July*, 1763, had not the least intimation, either from *Lely* or any other person, that any proceedings were had in the cause, until the 15th of *September*, 1768; when the respondent *Mark Sansam* was served with a writ of execution of the order for taking the issue *pro confesso* against him, the subsequent decree, and the Master's report. Immediately on this, fresh application was made to Mr. *Lely* for the papers in his possession, and it was not till some time in *October* following, that he delivered them up.

But immediately afterwards, the respondent *Mark Sansam* and his wife, and the respondent *William Sansam*, presented their petition of appeal to the Lord Chancellor *Camden*, stating the several proceedings in the cause, and the conduct of Mr. *Lely* as above mentioned, and praying, that the cause might be reheard, as to the directions given by the decree of the 5th of *July*, 1768, and that thereupon that decree might be reversed, and that the cause might be ordered to stand over to be heard, as to the matters reserved by the order of the 18th of *July*, 1763; and that previous to the hearing thereof, such issue might be tried at the then next *Lent* Assizes for the county of *Leicester*; and the petitioners *Mark Sansam* and *Ann* his wife, also prayed, that the order of the 18th of *March*, 1766, might be discharged.

The appeal having been set down for hearing for the 15th of *November*, 1768, the respondent *Mark Sansam* and his wife, gave notice of motion for that day, to discharge the order of the 18th of *March*, 1766, and that the issue might be tried at the then next assizes for the county of *Leicester*.

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On the 16th of *December*, 1768, the appeal and the matter of the motion came on to be heard, when his Lordship, upon the defendants paying the plaintiffs their costs incurred since the order directing the issue, did *by consent* (the appellant *Ann* having a considerable time before attained her age of 21) order, that the decree should be reversed; and that the parties should proceed to a trial of the said issue, at the then next assizes for the county of *Leicester*; and in case the issue should not then be tried, through the default of the defendants, it was ordered, that the same should be taken *pro confesso* as against them; and his Lordship reserved the consideration of all further directions until after the trial should be had, or the issue taken *pro confesso*; and any of the parties were to be at liberty to apply to the Court, as there should be occasion.

In pursuance of this order, the respondents *Mark Sansam* and *William Sansam*, paid the plaintiffs 70 *l.* and upwards, for the costs thereby directed to be paid; and the parties proceeded to a trial of the issue at the *Lent* Assizes 1769, for the county of *Leicester*, and after a full trial, and an examination of many witnesses on the part of the plaintiffs, and of thirteen witnesses on the part of the defendants, the jury (most of whom were special) found, that *Thomas Sansam* died on the 15th of *August*, 1746.

On the 31st of *March*, 1769, the respondent *Mark Sansam* and his wife, and the respondent *William Sansam*, obtained an order for setting down the cause to be heard on the equity reserved, and had it set down accordingly; but on the 8th of *June* following, and not before, the plaintiffs thought fit to give notice of motion for a new trial of the issue. The motion came on in the beginning of *July* following, before the Lord Chancellor, when it was insisted on as a foundation for the motion, that the defendants in the issue had several witnesses, who were not produced on the trial; and that their agent in *London* was newly appointed before the trial, and consequently, was ignorant of the merits of the cause: But his Lordship, on hearing the report of the Judge before whom the issue was tried, refused to direct a new trial.

On the 5th of *July*, 1769, the cause came on to be heard upon the equity reserved, when his Lordship ordered, that the bill should stand dismissed without costs.

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From this order, and also from the decree of the 16th of *December*, 1768, though made *by consent*, the present appeal was brought; and on behalf of the appellants it was insisted, that notwithstanding the verdict had found, that *Thomas Sansam* the devisee died on the 15th of *August*, 1746, the Court ought, upon the cause coming on for further directions, to have declared, that he did not accomplish his full age of 21, and to have given the consequential directions; it being a fact admitted by the respondents, and not controverted through the whole suit, that *Thomas Sansam* was born on the 16th of *August*, 1725, and therefore could not, as it was apprehended, *accomplish his full age of 21 years*, unless he lived to the 16th of *August*, 1746. That there being contradictory evidence as to the day on which *Thomas Sansam* died, whether upon the 14th or 15th of *August*, 1746, the question whether he attained the age of 21, was not decided, nor even debated upon the first hearing of the cause, on the 18th of *July*, 1763, but the issue was directed upon the opening, and the question left undecided till after the trial. That in case *Thomas Sansam* would be considered as having attained his age of 21, if he had lived to the 15th of *August* 1746, yet the verdict which was given on an issue directed to satisfy the conscience of the Court as to the fact, and which had found that he died on the 15th of *August*, was given upon the evidence of witnesses, who swore to a fact 23 years after it happened, without any circumstances to assist their memory; and upon reading the copy of an inscription on a grave-stone put up in the church yard, where the said *Thomas Sansam* was interred, and which was introduced on the trial for the first time; not being mentioned in the respondents answer to the appellants bill, nor examined to by them in the proofs before the Court of Chancery, and which there was reason to believe was fabricated for the purpose, and ought not to have been admitted in evidence. All which evidence was contradicted on the trial by many credible witnesses, examined on the part of the appellant *Ann*, who proved the death to be on the 14th of *August*, 1746; and whose testimony did not depend upon the mere memory of the fact, but was assisted by other circumstances, which gave sanction and

A. Wedderburn.
C. Ambler.

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and credit to the truth of their recollection : And therefore a new trial ought to have been granted, or a more proper issue directed, viz. “ Whether *Thomas Sansam* accomplished his full “ age of 21 years ?”

E. Thurlow.
J. Dunning.

On the other side it was contended, that the order of reversal of the 16th of *December*, 1768, was made *by consent*, and it was so expressed in the order itself ; the appellant *Ann* had attained 21, more than a year and a half before the pronouncing of that order, consequently the consent was binding on her ; and it is a known and established rule, that an appeal does not lie from an order made by the consent of parties. That the order pronounced on the 18th of *March*, 1766, besides the hardship which, if regular, it would have put upon the respondents, was in itself palpably erroneous, in directing the issue to be taken *pro confesso* against the respondent *Mark Sansam* only, when it ought to have directed, if any thing, that the issue should be taken as confessed against the respondent *Mark Sansam* and his wife, and the respondent *William Sansam* ; and that order was not a foundation for the subsequent decree made by the Master of the Rolls, on the 15th of *July*, 1768, and therefore that error was a sufficient reason, in point of regularity, for making the order of reversal of the 16th of *December*, 1768. That the hardship which would have been put on the respondents, in preventing them from trying an issue, which, from the evidence given in the cause, appeared so much in their favour, and for not trying which they were in no wise blameable, and directing that issue to be taken against them as confessed, and consequently determining the right against them, was a very strong and good ground of equity for the order of reversal ; and its justice was fully evinced by the verdict of the jury, which was entirely to the satisfaction of the Judge before whom the issue was tried, as appeared by his report ; and upon the application for a new trial, the Lord Chancellor thought there was no pretence for granting one : But if the plaintiffs were dissatisfied with his Lordship's determination, they ought to have appealed from the order refusing a new trial, instead of proceeding to the final hearing of the cause. That it was a fact clearly proved by several of the respondents witnesses, and even admitted by the appellant's petition of appeal, that *Thomas Sansam* was born on the 16th of *August*, 1725. It was therefore unnecessary to make it any part of

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of the issue, to try on what day he was born, the time of his death being the only thing necessary to be found, in order to ascertain whether he attained 21; and it was certain, that if he lived to attain that age, he was absolutely entitled to the estates in question, and that they descended on the respondent *William Sansam* as his heir at law. Now the rule of law is clear, and has been established by many determinations, that if, as in the present case, a person be born on the 16th day of a month, and be alive on the 15th day of the same month 21 years afterwards, that person has attained his age of 21, and that a will devising lands, made by such a person on that day, is a good will; because the law makes no fraction of a day: And therefore the issue directed was material, and (as it was certain that *Thomas Sansam* did not survive the 15th of *August*, 1746,) was framed in the most advantageous manner to try the fact between the parties; for if the jury found that *Thomas Sansam* died on the 15th of *August*, 1746, he had attained his age of 21; if they found he did not die on that day, he could not have attained his age; but as the jury found that he died on the 15th, the decree of the 5th of *July*, 1769, was right of course; there was an end of the claims of the plaintiffs in the cause, and the defendants the *Sansams* were entitled to have the bill dismissed.

After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree and order therein complained of, affirmed: And it was further ORDERED, that the appellants should pay the respondents, 100*l.* for their costs in respect of the said appeal.

DECREE affirmed.
M. S. Jour.
sub anno 1775.
p. 281.

James Nicol and *Thomas Davie*, Esqrs; Appellants. Case 22.

Harry Verelst, Esq; and others, - Respondents.

3d March, 1775.

THE appellant *James Nicol* went out to *Bengal*, in the sea service of the *East India Company*, in the year 1759; and soon after, the Company being involved in a very important war,

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war, he engaged as a volunteer in their military service, in which he continued till the year 1766, and rose by regular succession, from a Cadet to the rank of a Captain.

The other appellant *Thomas Davie*, having been in the Company's sea service for some years, in 1762 obtained a licence from the Court of Directors to go out to *India*, and settle there for the purpose of trade: In consequence of which, he went first to *Madras*, and soon after to *Bengal*, where he entered as a Cadet, into the Company's military service, in which he afterwards rose to the rank of a Lieutenant, and continued in the army till the year 1766.

In the latter end of the year 1765, Lord *Clive*, then Governor of *Bengal*, thought proper to make a reduction in the military establishment of that Presidency, by depriving all under the rank of field officers of the allowance called *batta*, which had been usually given, through all *India*, in addition to the pay of the officers upon service.

By this step the appellants found themselves deprived of every emolument which could give them the least prospect of bettering their fortunes in the army, their pay being no more than sufficient, in that country, to support their rank, and defray their expenses in the field. They therefore determined to quit the service; to which resolution the appellant *Nicol* was further induced, by a disgust he had conceived on account of a supercession, which he did not think his services had merited. Accordingly, in the months of *May* and *June* 1766, both the appellants tendered a resignation of their commissions. And were soon afterwards ordered down to *Calcutta*, where they found their resignations were accepted.

Being thus entirely out of the service of the Company, it became necessary for them to look round for some other means of advancing their fortune, and obtaining a competency, which should enable them to return to their native country. For this purpose a settlement as merchants, in the country of *Sujah Dowlab* the Nabob of *Oude*, was the first and most desirable object that presented itself to their view. The appellant *Nicol* had, not long before, commanded a detachment in the province of *Oude*,

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Oude, and had made the circuit of the country with the Nabob, to assist him in the collection of his revenues. By his conduct and services on that occasion, he had much recommended himself to the favour of that Prince, which he had obtained in a high degree, and had received the strongest assurances of his future friendship and regard. From this circumstance, the appellants whose intention was to enter into partnership in trade, conceived strong and well founded expectations of *Sujab Dowlab's* countenance and support, which could not fail of being highly advantageous to any person who should settle for commercial purposes in his dominions. Besides this, the appellant *Nicol*, in consequence of his former residence in the province of *Oude*, had effects of considerable value in that country; to collect and make the best advantage of which, his presence was peculiarly necessary. These motives determined them both to attempt a commercial establishment in the dominions of *Sujab Dowlab*; and accordingly, they set out for that country in the month of *November* following their resignation.

Their reception from *Sujab Dowlab* was as favourable as their hopes had promised: That prince not only gave them free permission to trade in his country, with every assurance of favour and protection, but made a present to the appellant *Nicol* of a house of very considerable value, for his residence at *Fyzabad*, the capital of the province. They immediately applied themselves to trade, and entered into contracts in different parts of the country to a very large amount, and of a most profitable nature; and from their situation they had a prospect of advantages equal to their most sanguine expectations. As the *East India Company* had at that time no factories in the province where they were settled, which was out of the limits of the presidency of *Bengal*, they did not conceive that the trade they carried on there could in any way affect, or interfere with the commerce of that Company; nor did they apprehend, that any umbrage could be taken by the government of *Bengal* at their conduct; especially, as they had acquainted the governor and council, by letters, of their intentions, to guard against any jealousy or suspicion that might have been entertained, if they had made any secret of their design; they therefore flattered themselves, that they should be permitted to advance their fortunes unmolested, and

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and to reap, undisturbed, the fair and just advantages of their situation.

But in these expectations they found themselves disappointed; for soon after their settlement in *Oude*, the Nabob received a letter from the respondent *Verelst*, then governor of *Bengal*, acquainting him, "That as Mr. *Nicol* was no servant of the Company, he must be sent home; and desiring leave for the Company's troops to make him a prisoner." Though *Sujab Dowlab* refused his permission to Captain *Hill*, the commanding officer of the Company's troops at *Fyzabad*, to seize the appellant *Nicol*, yet that officer sent two companies of Seapoys to surround the house where he then was. In this situation, the appellant being unwilling to involve the Nabob in a dispute with the Company on his account, determined to go to Sir *Robert Barker* at *Allahabad*, who was at that time commander in chief of the company's forces in that country, in order to learn the cause of these extraordinary proceedings, and to obtain permission, if possible, to remain unmolested in *Sujab Dowlab's* dominions. Accordingly, on the 10th of *March* 1767, he waited on Sir *Robert Barker*, with the appellant *Davie*, who accompanied him; but found all expostulation was in vain. Sir *Robert* said he had received an order from the respondents, the then governor and council of *Bengal*, to send both the appellants down to *Calcutta*, with which he should comply in three days. The appellants could not even obtain the indulgence of returning for a short time, to settle their affairs, but were obliged to give their honour that they would not leave the fort without permission. On the 13th of the same month, they were sent from *Allahabad*, under the guard of a party of Seapoys, who carried them on board a budgerow (a sort of boat used in the rivers in that country) where centinels with fixed bayonets were placed over them. In this situation they were conducted to *Patna*, where their guard was relieved by another, which attended them to *Mongheir* fort, where they arrived on the 2d of *April*. Here they were confined under a guard of Seapoys for near five months, although an epidemical distemper raged in the fort during great part of that time, to such a degree, that the garrison was obliged to be marched out, and encamped in separate parties in the country; and the appellants were the only Europeans left in the place, in a state of health which endangered their lives, and

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in want of every convenience and assistance necessary for such a situation. At length, on the first of *September* 1767, they were carried on board a budgerow, and conveyed down to *Calcutta*, as prisoners, under a guard of Seapoys with fixed bayonets. On the 12th of the same month, they were landed at *New Fort William*, after having been kept three days lying off the fort in the budgerow, at a season of the year when the extraordinary tides in the *Ganges*, called the *Boars* or *Banns*, were at the highest, which makes it extremely dangerous for any boats to lie in the river. In *New Fort*, the appellants were kept six days in close confinement, in an apartment in the barracks, with such rigour, that they could scarce procure the common necessaries of life. On the 18th of *September*, they were forced on board a small sloop, destitute of every accommodation necessary to preserve them from the inclemency of the weather. In her they were carried down to *Ingelee Road*, where the *Lord Holland*, a ship in the Company's service bound for *England*, then lay, and were kept in that miserable situation till the 12th of *October*, exposed to the effects both of wind and rain in a very inclement season. On the 12th of *October*, the officer who commanded their guard, by order of the respondents, carried the appellants on board the *Lord Holland*, to be conveyed in her, as prisoners, to *England*; but Captain *Nairne*, who commanded the ship, refusing to receive them on board as prisoners, they were carried back to *Calcutta*, and were ordered to be again confined in the *New Fort*; by this time the illness occasioned by their confinement, and the effects of the weather in the sloop, had reduced both the appellants to the greatest extremity, and their lives were in imminent danger. They had frequently, during the course of their long and severe imprisonment, applied to the respondent *Verelst*, to be released from their confinement, or to be informed of what they were accused, and brought to a speedy trial, if they were charged with any crime; but all their applications had hitherto proved ineffectual. The state of their health, however, was now such, that the loss of their lives must have been the probable consequence of another close confinement in the fort; they therefore declared, that they would rather die where they were, than be removed to suffer fresh hardships and severities. The officer who commanded their guard, seeing the condition they were in, would not force them, but went immediately to represent their case to the respondents, the governor and council;

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and at length, upon that representation, they were permitted to go at large in the town of *Calcutta*, upon giving their parole that they would not leave it without acquainting the governor; the respondents being apprehensive of the consequences, if either of them should die under so severe and unjust a confinement. The appellants having lost their health, and being ruined in their fortunes, by this series of oppression, determined to return to *England*, and seek redress for the heavy and unmerited injuries they had sustained. They accordingly gave notice to the respondents of that intention; and after drawing up a protest, to be presented to the governor and council, they embarked for *England* on the 16th of *December* 1767, in the *Norfolk East Indiaman*.

The respondents *Verelst*, *Smith* and *Campbell*, arriving in *England* in the year 1770, the appellant *Nicol* brought his action against them, for the injuries sustained by so long and severe an imprisonment, and declared in that action, in *Michaelmas* Term in that year; and the defendants, in *Hilary* Term following, pleaded the general issue, and also a special justification; and in the same term, filed a long bill in the Court of Exchequer, praying an injunction, and a commission to examine several witnesses in the *East Indies*. Soon after this, a negotiation was set on foot with a view to a compromise, and the appellant *Nicol* was amused with hopes, that he should receive a compleat recompence and re-establishment of his fortune, without the expence and trouble of proceeding further. Under these hopes he was prevailed on to discontinue his action, it being also agreed, on the part of the respondents *Verelst*, *Smith* and *Campbell*, that the bill in the Exchequer should be dismissed, which, however, was not done till above two years after; nor till the appellant had been put to the expence and trouble of putting in a full answer, and of other proceedings upon it.

The treaty for a compromise was kept up from time to time, without effect, for more than two years, till at length the appellant finding himself amused with fruitless expectations, and believing nothing satisfactory was intended to be done, he determined to proceed again to obtain redress in a Court of Law; but before he could carry this resolution into effect, it was necessary to dissolve the injunction in the Court of Exchequer, which

which had been issued, of course, till the coming in of an answer. He was therefore obliged to put in an answer to the bill of the respondents *Verelst, Smith and Campbell*, in that Court, which he did in *Trinity Term 1773*. Upon this he obtained an order to dissolve the injunction, unless cause should be shewn for continuing it, upon the merits; this order was afterwards enlarged till the sittings after the term, when no cause being shewn, the injunction was dissolved.

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Having thus got rid of the injunction in the Court of Exchequer, the appellant *Nicol* brought a fresh action against the respondents, in the Court of Common Pleas, in *Hilary Term 1774*; in which he declared, that the respondents made an assault upon him, and unlawfully imprisoned him in divers unwholesome places, and detained him so imprisoned for the space of eight months; by means whereof he acquired many grievous complaints, and became sick, weak and distempered; and continued so sick, weak and distempered for a long time; and was in great danger of losing his life; and was prevented from following his necessary business and affairs; and was put to great expence in and about procuring his enlargement, and in and about procuring necessary relief, advice and assistance, in the distempers with which he was afflicted; for all which he laid his damages at 50,000 *l*.

To this declaration, the respondents pleaded not guilty; and also a justification, setting forth the statute of the 9th and 10th of King *William III.* for incorporating the *East India Company*, and the Company's charter granted in pursuance of that act; and stating, that the appellant, being a subject of this kingdom, was found in the *East Indies*, in a country in *Asia*, beyond the *Cape of Good Hope*, and on this side the *Streights of Magellan*, where trade was then used by the Company, to wit, at *Allahabad*, not being lawfully authorised thereto; and had been there trafficking and trading, not being lawfully authorised there, contrary to the statutes in that case made and provided; and that they, the respondents, as servants of the Company, and by their command, did seize the appellant, that he might be sent to *England*; and for that purpose did conduct him in custody to *Calcutta*, being the most proper and convenient place for the purpose of sending him to *England*; and that before any opportunity

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tunity offered of sending him to *England*, he was discharged out of custody at his own instance and request, and afterwards took his passage to *England*, in the *Norfolk East Indiaman*; and on the occasion and for the purpose aforesaid, he was necessarily detained in custody during the time in the declaration mentioned.

To this plea, the appellant replied in the same term; admitting the acts of Parliament and charter, and saying, that the respondents had imprisoned him of their own wrong, without the residue of the cause in the plea alledged: And upon that replication, issue was joined and delivered on the 31st of *January* 1774, with notice of trial for the sittings after the then *Hilary Term*.

In this state of the cause, the respondents, having dismissed their own bill in the Court of Exchequer, caused another to be filed in the Court of Chancery, to the same effect, and almost exactly in the same words with that in the Exchequer; praying, among other things, that a commission might issue for the examination of several witnesses in the *East Indies*; and that in the mean time, the appellant might be restrained from proceeding at law till such commission should be executed and returned, and therefore, that a writ of injunction might be granted. For this purpose, the bill stated the act of parliament of King *William III.* and his charter, which were stated in the respondent's plea of justification; and also several other acts of parliament granting further powers and privileges to the *East India Company*. The respondents likewise set forth particularly, their own appointment or succession to the several offices of governor and members of the Council in *Bengal*, and also as president and members of a select committee, established there by the Court of Directors of the *East India Company*, with extraordinary powers, and stated a number of orders and resolutions of the Court of Directors, and of the Governor and Council and select Committee of the presidency of *Bengal*, for the regulation of the trade and servants of the Company in that presidency; and also some orders of the Governor and Council, for recalling to *Calcutta* several servants of the Company, and others, as were trading or residing up the country, without having obtained leave for that purpose. And after stating the action brought by the appellant *Nicol*, the

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bill proceeded to charge, that the imprisonment complained of in that action, was only in consequence and by virtue of their authority, as president and members of the Council or select Committee in *Bengal*, and by the orders of the *East India* Company, or their Court of Directors, or as servants of the Company, under and by virtue of the several acts of parliament before stated, and the charter of the *East India* Company; and that the appellant being a subject of this kingdom, and being found trading in the *East Indies*, in a country in *Asia*, beyond the *Cape of Good Hope*, and on this side the *Streights of Magellan*, where trade was used by the Company, and within the limits in the several acts of parliament and charter before mentioned, without the licence of the Company; or being found there without such licence, and contrary to their express orders; the respondents, in their respective capacities, as governor or president, and members of the Council, together with others of the Council and select Committee, and as servants of the Company, and by their command, caused the appellant *Nicol* to be seized, in order to be sent to *England* by the first ship that should sail; and for that purpose he was conducted, in custody, to *Calcutta*, which was the most proper and convenient place from whence to send him to *England*; and afterwards, and before any opportunity offered of sending him to *England*, he was discharged at his own instance and request, and did afterwards embark in the *Norfolk East Indiaman* for *England*; and that they the respondents, as servants of the *East India* Company and by their command, did lawfully cause the appellant to be imprisoned, and detained in prison in the *East Indies*, and that during such imprisonment he was used with all possible lenity, consistent with his situation and behaviour; and that they had accordingly pleaded a justification to that effect. The bill among other things, further charged, that the appellant knew of the several orders for recalling to *Calcutta*, persons trading up that country; and that he was trading at *Banares*, *Garrackpore* and *Fyzabad*, and other places in *Indostan*, in the *East Indies*, within the jurisdiction and limits of the subaship of *Bengal*, and within the limits mentioned in the several acts of parliament and charter of incorporation in the bill stated, and in countries and places where the *East India* Company had forts or factories, and in which they carried on trade; and that he remained and traded there, from the month of *May* 1766 till *March* 1767, when the Nabob *Sujah Dowlah*,
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brought the appellant with him to *Allababad*, and delivered him to Sir *Robert Barker*, in compliance with the several letters written by the Governor and Council, requesting him to be delivered up. That the appellant being and trading in the country of *Sujab Dowlab*, was not only without the permission of the Governor and Council, which they refused to give him, but also contrary to the express orders before stated. The bill further charged, that on the 26th of *January*, 1767, the appellant wrote a letter to the Governor and Council of *Fort William*, at *Fort William*, acquainting them, that the Nabob *Sujab al Dowlab* had some time before made him, the appellant, a promise of settling in his country as a merchant, and therefore desiring their acquiescence to his residing there in that capacity; and by another letter to Mr. *Verelst*, the appellant declared, that his sole intention of going up the country was to collect in his fortune, then in the hands of people whom nothing but his presence could oblige to pay, and to employ it in trade to the best advantage, under the countenance of the Nabob *Sujab Dowlab*, who had given him liberty in his country for that purpose; and which he made no doubt the Nabob would attest, if required. And by another letter, dated the 4th of *March* 1767, to Colonel *Barker*, he wrote, that it was never his intention to enter into the service of any *Indostan* powers, but that his coming into that country, was only embracing an offer which he had some time before from the *Subab* there, of settling as a merchant. The bill then stated, that the last ship which was to sail for *Europe* in that season, was the *Nottingham* (except the *Mercury*, which was only a packet); which ship, on the 9th of *March* 1767, lay at *Ingelee*, which is 7 or 800 miles distant from *Allababad*; and being ready to sail, and the appellant not being delivered up to Sir *Robert Barker* till the same 9th of *March*, it was impossible to reach that ship before her departure. And the bill charged, that the Governor and Council at *Fort William*, found by experience, that it was impossible to allow the liberty of the town of *Calcutta*, to persons who were under orders to repair to *Europe*, without their having an opportunity of absconding. The bill further alledged, that the several resolutions, letters and orders therein mentioned, were then in *India*, and also several material witnesses, without whose evidence the respondents could not make out their defence to the appellants action; and the names of the witnesses alledged to

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to be in *India*, to examine whom a commission was prayed, were Nabob *Sujah al Dowlah*, Monsieur *Gentie*, Sir *Robert Barker*, *Shah Boorawn* Linguist, *Colan Nica*, *Harcarrah*, *Coa Bill* *Harcarrah*, *Boany Sing* Subadar, *Buck Ter Cawn* Seapoy, *Philip Delafield*, Esq; Captain *Harper*, Captain *James Skinner*, Captain *George Eyres*, *Anseylme Beaumont*, Esq; *Simon Droz*, Esq; Lieutenant *Gwinett*, *William Cooke*, Serjeant *Pew*, Lieutenant *John Brown*, and Dr. *Ellis*. The bill therefore prayed, that one or more commissions might issue for the examination of the respondents witnesses in the *East Indies*; and that they might be at liberty to examine their witnesses there, as they should be advised, under the order and authority of the Court; and that in the mean time, the appellant *Nicol* might be restrained, by injunction, from proceeding at law against the respondents in his said action.

The appellant *Nicol* by his answer to this bill, admitted the several acts of parliament, the charter of incorporation, the appointment of the select committee, and the respective appointments and succession of the respondents therein stated. He likewise admitted the several orders and resolutions of the Court of Directors of the *East India* Company, and of the Governor and Council, and select Committee in *Bengal*, so far as the same had come to his knowledge; and as to such of them as he was not acquainted with, he referred to the consultations, from time to time transmitted to the Court of Directors, and preserved at the *India* House, and to the other books of general letters and orders at the *India* House, in which copies of all such proceedings must necessarily appear, and which he agreed to admit as evidence upon the trial of the cause. He denied, that the imprisonment complained of, in his action against the respondents, was only by virtue of their authority as president and members of the council or select committee, and by order of the *East India* Company, under their charter and the several acts of Parliament; for he contended, that neither the authority of the respondents, or any of them, as president or members of the Council or select Committee, or as servants of the *East India* Company, could authorize or justify such an imprisonment and cruel usage as he had experienced; and therefore the same was not, nor could be by virtue of such authority; nor did he believe that the Court of Directors ever issued any order or command for such unjust purposes: But if they did, the same could not be warranted by their charter, or
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any of the acts of Parliament. He admitted, that he was a subject of this kingdom, and that he was trading in the *East Indies*, in an inland country in *Asia*, which, if reckoned eastward, is beyond the *Cape of Good Hope*, and on this side of the *Streights of Magellan*, without the licence of the *East India Company*; but he denied, that, to his knowledge or belief, trade was then carried on by the Company therein, or that the same was within the limits mentioned in the charter or acts of Parliament, or any of them, according to their true construction: And he stated, that the country in which he was then settled for the purposes of trade, was in the dominions of *Sujah Dowlah*, a sovereign Prince, independent of the *East India Company*; and therefore he did not apprehend, that any licence from the *East India Company* was necessary for the purpose of trading there. The appellant further admitted, that the respondents, in their respective capacities as governor and members of the council, and as servants of the Company, but not as he believed by their command, caused him to be seized and conducted in custody to *Calcutta*, which was the most proper and convenient place from whence to send him to *England*; but he did not believe, that he was so seized and conducted thither for the purpose of sending him to *England* by the first ship that should sail; for he said, that he was not sent to *England* by the first ship, which he might easily have been, if the respondents had thought fit to do it: And he conceived, if their intention had been such, he would have been brought down immediately to *Calcutta*, and not imprisoned for near six months in *Mongbier* fort, and other places. The appellant also denied, that he was discharged before any opportunity offered of sending him to *England*, or, as he believed, at his own instance and request; for he said, that he had made many ineffectual applications, during his imprisonment, to procure his release; and he believed, that his discharge at length was owing to the representations of the officer in whose custody he was, of the danger his life was in, and to some apprehensions which the respondents might entertain on that account. And he insisted, that at least two opportunities offered of sending him to *England*, while he was in confinement, one by the *Mercury* Packet, and another by the *Lord Holland* Indiaman; but he admitted, that after his discharge, and when his health was in some degree restored, he did embark for *England*, on board the *Norfolk*, as stated in the bill. The appel-

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lant denied that the respondents as servants of the *East India* Company, and by their command or otherwise, did lawfully cause him to be imprisoned and detained in prison in the *East Indies*; for he insisted, that not being resident within the limits in the several acts of Parliament and letters patent mentioned, and not having in any wise interfered with the trade or commerce of the *East India* Company carried on under their charters, or in any manner whatsoever offended against the laws of *England*, or the provisions of any of the several acts of Parliament or letters patent; the imprisonment and detainer in prison of the appellant were altogether illegal and unjust, and not authorized or warranted by any of the powers vested by the several acts of Parliament or letters patent, or any or either of them, in the *East India* Company, or by that Company in the respondents as their servants. And he positively denied, that during such imprisonment as aforesaid, he was used with all possible lenity consistent with his situation and behaviour; but, on the contrary, said, that he was, during the whole time of such imprisonment, used with very great severity and cruelty, not required by his situation, or merited by his behaviour in any respect. He admitted, that he had heard, but knew not of his own knowledge, of the several orders in the bill stated, and that he was trading at *Benares*, *Garrackpore*, *Fyzabad*, and other places in *Indostan*, during the time in the bill mentioned from *May* 1766, till *March* 1767, without the permission of the Governor and Council, and he believed contrary to some of the orders in the bill stated; but he said, that those orders were not at that time known to him: And he denied that those places were within the jurisdiction or limits of the Subaship of *Bengal*, or within the provinces or kingdoms of *Bengal*, *Babar*, and *Orissa*, or that the *East India* Company had any forts or factories there at that time, to his knowledge or belief; and he also denied, that the Nabob *Sujab Dowlah* ever delivered him up to Sir *Robert Barker*, or any other person; but said that he was made a prisoner against the inclination of that Prince, as he believed. He admitted the three several letters to the Governor and Council, to the respondent *Verelst*, and to Colonel Sir *Robert Barker*, as stated in the bill: And that the last ship of that season 1767, which was to sail for *Europe*, except the *Mercury* packet, was the *Nottingham*, and that she lay at *Ingellee* ready to sail on the 9th of *March*, so that it was impossible for him to reach that

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ship before her departure. But he insisted, that passengers often go from *India* to *Europe* in packets; and as they belong to the Company, he believed the president and council had more authority to enforce their orders on board them, than in the ships taken up on charter party. And he said, that he had been informed, and believed, that the *Mercury* did not sail till after the 10th of *April* following, before which time he might easily have been conveyed on board, if the intention of the respondents had been to send him to *England* by the first ship. As to the several witnesses named in the bill, the appellant said, that *Samuel Pew* was long since dead, and was known to be so by the respondents at the time of filing their bill, and that Lieutenant *Gwinett* or *Garnett*, *James Skinner*, and *George Eyres*, were in *England* long after the appellant's first action was commenced, and after the bill filed in the Exchequer; and that *William Cook* was then in *England*: That *Shaw Booram*, *Colan Nicca*, *Coa Bill*, *Boany Sing*, and *Buckter Cawn*, were all with Captain *Douglas Hill*, and in his service at the time of the transactions in question, and did not, as the appellant believed and was well assured, know any thing relative to them, but what was likewise known and could be proved by Captain *Hill* himself, who was then in *England*. And he further said, that *Anselm Beaumont* Esq; left *India* long before any of the transactions respecting the said arrest and imprisonment, and before the appellant resigned his commission; and therefore could not, as the appellant conceived and submitted to the Court, depose any thing material upon the trial of the cause; and he too was in *England*, as the appellant had been informed and believed, from the time of commencing the first action, till after the present action was commenced; and was then, as the appellant had been informed and believed, in *Italy* with Lord *Clive*. And that *Sujah Dowlab* and *Monsieur Gentill* were neither of them subjects of his Majesty, or living under his protection, or that of the *East India* Company, and therefore he submitted to the Court, that the commission prayed by the bill could, with regard to them, have no effect: That the appellant did not believe, that the other witnesses in the bill named could depose any thing material for the defence of the respondents; and said, that he was well assured, that authentic minutes, entries, or copies of all such orders, resolutions, commissions, and other documents in the bill mentioned, as were in fact made, granted, or entered into by the Governor and Council of *Bengal*,
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the select Committee, or any or either of them, did appear and were preserved in the consultations, or other papers or documents at the *East India* House in *Leadenhall-street*, and might be had and obtained by the respondents; and that the appellant was ready and willing to consent, that such consultations, minutes, entries or other documents at the *East India* House, or copies of them authenticated by the secretary, or other proper officer in whose custody the same were usually kept, or such parts of them as should appear any ways material, should and might be read at the trial of the action, in the same manner as the originals in the *East Indies* might be, if they were produced. And he further said, he was also ready and willing to make all further just and reasonable admissions which he could consistent with the truth; and particularly, if the respondents would state the facts, to prove which they were desirous of examining all or any of the witnesses who were out of the kingdom, the appellant, if the said facts were truly stated, was ready and willing to enter into any rule or agreement the Court should direct, to admit such facts upon the trial of the action; and therefore hoped, he should not be prevented any longer, by the injunction, from proceeding by the laws of his country, to obtain a compensation for the injuries he had sustained.

The other appellant *Thomas Davie* stood exactly in the same situation with the appellant *Nicol*; he was seized at the same time, and accompanied him in all his sufferings; to obtain redress for which he brought first one action, and afterwards a second, at the same times, and under the same circumstances respectively as the appellant *Nicol*. The proceedings, both at law and in equity were the same, except that the fortune which he lost by the imprisonment, being less than that of the appellant *Nicol*, he paid his damages at only 20,000*l*. His answer to the bill in Chancery differed in no material from that of the other appellant already stated.

On the 23d of *February* 1774, the respondents moved the Court of Chancery in both the suits, praying that injunctions might issue in each of the causes, to stay the proceedings at law; and that such injunctions might extend to stay trial; which was ordered accordingly, on hearing counsel, and reading the appellants answers.

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J. Adair.

A. Macdonald

The appellants apprehending themselves aggrieved by these orders, appealed from them; insisting, that from the whole of the respondents proceedings in the Courts of Equity, it appeared, that the applications for injunctions, and commissions to examine witnesses, were calculated merely for vexation and delay. The appellants were suffered to proceed in their actions, even to the giving notice of trial, before the bills in Chancery were filed. Most of the Company's ships had then sailed for *India*. From the great length of those bills, it was hoped the appellants would not be able to prepare full answers to them, within the time limited by the rules of the Court; and in that case, if the appellants had either moved for further time, or put in insufficient answers, injunctions would have issued of course, and there would have been the greatest probability that all the later ships would have sailed; by which an additional delay of near a year would have been occasioned. The facts stated by the respondents in their bills, not being supported by affidavits, stood as mere assertions, and entitled to no degree of credit, except so far as they were admitted in the answers. And in cases circumstanced like the present, it was conceived that the clearest ground should be laid, and verified in the most satisfactory manner, before the plaintiffs at law were prevented from the only means they could have, to obtain redress for the severe oppressions and injuries which they had sustained. Should any of the material witnesses for the plaintiffs at law die, or should they themselves die, they might by that means, or by many other events which might probably happen before the execution and return of a commission from so very distant a country, be forever precluded from obtaining any redress. Every contingency must necessarily turn out in favour of the respondents, and against the appellants; and this ought to have been a conclusive reason against the interposition of a Court of Equity, which placed the parties in so very unequal a situation. That there were few cases of this nature, where the principal allegation of the bill *that there were in India witnesses material and necessary for the defence*, could receive so full an answer as it had done in the present case; or where the conduct of the parties applying to Court of Equity, less entitled them to favour or assistance. For as to most of the witnesses, a direct answer was given to the allegations of the bill; and therefore what credit could be given

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o those, respecting the very few that remained? Besides, the stating so many witnesses to be in *India*, who were well known to the respondents either to be dead, or in *England* at the time, was an attempt to impose on the Court, and ought to have been a decisive reason against any interposition on the respondents behalf.

But further; the respondents while in *India*, and so long ago as the year 1767, were fully informed of the intentions of the appellants, to seek redress for the injuries they had sustained, and of the particular circumstances on which they grounded their complaint: They had therefore had near eight years to prepare for their defence, with all the advantages arising from their own authority in *India*, and the assistance of the *East India* Company, both there and in *England*. But if they neglected to make use of these opportunities and advantages, it would be highly unjust to permit them to avail themselves of their own negligence, and thereby to delay the appellants in obtaining redress. Most of the material facts in the respondents pleas of justification, were admitted by the appellants in their answers; the inferences and conclusions only being denied. As to those facts which were not admitted, they would be all found upon examination to be such, as, if true, could be most easily and certainly proved by written evidence at the *India* House, or by witnesses now in *England*; and the respondents could never have a better opportunity of proving their justification than at present, when so many gentlemen who were in *India* at the time of these transactions, and so many of the witnesses by themselves stated to be material, were in *England*.

On the other side it was contended, that the orders appealed from proceeded upon a fundamental maxim in the administration of justice, namely, *that both sides are to be heard*; and as the parties were to be heard by their evidence and witnesses as to matters of fact, the end of the orders in question, was to give the respondents an opportunity of bringing over their evidence from a foreign country, to maintain the truth of the justification which they had pleaded. That Courts of Law pay an attention to *audi alteram partem*, so far as Courts of Law could go; and therefore would put off a trial on an affidavit made by the defendant, that he had material witnesses abroad, who were

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expected to return home in a reasonable time ; it not being the fault but the misfortune of the party, that his witnesses were not within the reach of the Court's process, whereby their attendance on the trial might be compelled. But where witnesses reside abroad, and cannot or will not attend personally in *England*, the power of the courts of law was at an end, as they had no means of examining witnesses abroad : But the Court of Chancery having an authority to issue commissions under the Great Seal for various purposes, and, amongst others, for examining witnesses in causes depending in that Court, the suitors there, who were defendants in a Court of Law, had availed themselves of the power of the Court of Chancery to come in aid and supply a failure of justice, by preferring their bills there ; stating their case and the proceedings at law, with their misfortune of having their witnesses resident abroad, and not compellable to appear at the trial, so that the benefit of their testimony could not be had ; and therefore praying, that the Court would relieve against this accident, and grant them a commission for the examination of their witnesses, to the end that their depositions might be read at law ; and as it would be nugatory to try the cause without evidence, praying also, that the plaintiff at law might be restrained by injunction from proceeding in the mean time, till the return of the commission. Both the Court of Chancery and the Exchequer, as Courts of Equity, have always entertained these bills, as belonging to one of their great sources of jurisdiction, the relief against such accidents as are beyond the power of Courts of Law to aid. As such applications however, occasion a delay to the plaintiff at law, the Courts of Equity have regulated the practice of issuing injunctions in such cases, with great care and caution. The injunction issues, if the plaintiff at law delays appearing to or answering the bill, beyond the periods allowed by the Court ; because it is unjust, that he should take advantage of his own contumacy or delay, to distress the defendant. But the injunction in Chancery only stays execution, and not trial, without the special order of the Court ; and therefore it must be specially moved, that the injunction may extend to stay trial, which motion must be founded on an affidavit verifying the equity of the bill. But if the appearance be entered, and the answer filed in due time, the plaintiff in Equity is excluded from making any affidavit in his own case, after the defendant has answered up-

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on oath, and the obtaining the injunction must then depend upon the confessions in the defendant's answer alone; and in that case, the injunction, and its being extended to stay trial, must be moved for on the merits confessed in the answer. Policies of insurance have afforded numerous occasions for the exercise of this jurisdiction in Courts of Equity, where the underwriter being sued on a policy made upon a ship in foreign parts, has discovered a fraud in the policy, by misrepresentation of the true state of the ship at the time, but cannot shew the fraud in proof, because his witnesses are abroad. Many other foreign transactions have afforded like occasions; so that the use of such bills has been long established, and the increase of commerce has augmented their use. To the justice and expediency of these proceedings, the legislature itself, in the statute 13 Geo. III. c. 63. s. 44. has given testimony, by authorizing any of the Courts at *Westminster*, to award writs in the nature of commissions, for the examination of witnesses in *India*, in suits which arise in *India*, and are within that act of Parliament; upon which it must necessarily follow, that the trials of such suits must be stayed till the depositions are returned.

In strict conformity to these rules, the injunction in the present case was granted. The action was brought. The defendants pleaded a justification, and then filed bills in Chancery for a commission, and in the mean time an injunction. The defendants answers came in in time, and an injunction was moved for upon the merits to extend to stay trial. The material points of the justification at law were, 1st, That the appellants were found in the *East Indies*, beyond the *Cape of Good Hope*, where trade was used by the *East India Company*, and not being lawfully authorised. 2d, That they were trading and trafficking, not being lawfully authorised. 3d, That the respondents, as servants of the Company, seized the appellants, in order to their being sent to England. 4th, That they were conducted in custody to *Calcutta*, being the most convenient place for sending them home to England. 5th, That before any opportunity offered, they were discharged at their own request. 6th, That they afterwards took their passage in the *Norfolk East Indiaman* to England.—The bill stated, that the cause of action arose in *India*; that many of the witnesses of the several transactions were resident

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resident there; and pointed out several by name, whose evidence was material in support of these facts. The defendants answers admitted, that the cause of action was an arrest and imprisonment in *India*; the nature of the transactions was such, that many persons, resident in *India*, must have been privy to and witnesses of the whole; it was impossible to be otherwise; and the answers did not deny, or make any doubt of it; the justification was such as could be proved only by eye-witnesses, and many of those witnesses were admitted to be in *India*. Under these circumstances, the respondents claimed the benefit of a commission as a matter of right, and essential to the defence of their property, 70,000 *l.* of which was demanded by the appellants as a satisfaction for supposed injuries, which by law did not entitle them to recover any satisfaction; for the justification not being demurred to, was admitted by the appellants to be a good defence in law, and it only remained to be proved true in fact; which it behoved the respondents to be careful to do, and not risque a trial without a full complement of evidence. Being therefore well entitled to a commission for the examination of their witnesses in *India*, the order in question granting an injunction in the mean time, was no more than a necessary consequence of that right. Besides, the appellants were not in danger of losing any of their evidence by the delay; for under the respondents bills, they had examined their witnesses *de bene esse*. Add to this, that an order for a commission had been pronounced, which the appellants not only acquiesced in, but had also joined in the commission, and named their own commissioners; by which they had admitted the expediency of a commission in the present case; and their pressing to try the causes before the evidence arrived, was not reconcilable with a case really meritorious.

ORDERS
affirmed.
M. S. Jour.
sub anno 1774.
p. 308.

After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the orders therein complained of, affirmed *.

* The attorney for the respondents has informed the Reporter, that upon the trial of the action brought by the appellant *Nicol*, there was a special verdict, which being argued, the Court of Common Pleas gave judgment for the defendants. In consequence of which, the appellant *Davie* did not try his action.

Charles Chaplin, Esq; - - Appellant. Case 23.

John Bree, Clerk, - - Respondent.

8th March 1775.

SIR *John Brownlow*, Bart. died seised, amongst others, of an estate at *Rysolm* and at *Grange de Lyngs*, in the county of *Lincoln*. After his death, his widow, Dame *Alice Brownlow*, was in possession of this estate till the year 1714; when, in consequence of an act of Parliament for vesting all the real estates of Sir *John Brownlow* in trustees, to be sold for the purposes therein mentioned, the estates at *Rysolm* and *Grange de Lyngs* were conveyed to the then Sir *John Brownlow*, Bart. afterwards Lord *Viscount Tyrconnel*, of whom, in the year 1721, the same were purchased by *Thomas Chaplin*, Esq; the appellant's father.

At the time of this purchase, Mr. *Chaplin* was particularly careful to ascertain the outgoings from the estates, which were by agreement to be allowed for, by a drawback from the purchase money, according to the price which he had given; and after an examination of the several deeds, accounts and vouchers then in Lord *Tyrconnel*'s possession, an account of the annual outgoings was made out, and a drawback out of the purchase money was repaid according to the agreement. In this account of the annual outgoings, were contained the following articles; viz. To the Rector of *Rysolm*, 15*l.* procurations and synodals, 10*s.* 1½*d.*

From the year 1721, these outgoings were regularly and uniformly paid by the appellant's father, and after his death, by the appellant, till the year 1767; when the respondent, soon after his institution to the rectory, claimed tithes in kind instead of the said yearly payments.

Though the respondent is called a rector, yet there has not been in *Rysolm*, any church or place of public worship, or any parsonage house, any resident minister, or any divine service within time of memory, if ever. The rectory (if it be properly so called) is an absolute sinecure; and it never was contended, that tithes in kind, or any other payments in lieu of tithes, but the

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above mentioned yearly payments, were ever received or demanded by any of the respondent's predecessors.

By the statute of *Queen Ann*, for discharging small livings from their first fruits and tenths, the bishops of every diocese are required to inform themselves, as well by oath, as by all other lawful ways and means, of the improved yearly value of every benefice under 50*l.* and it is expressly enacted, that the certificate of the Bishop shall ascertain the clear yearly value of the benefice. Under the directions of this statute, *Ryfolm* was certified by the Bishop to be of the clear yearly value of 15*l.* It was afterwards augmented by *Queen Ann's* bounty, and the respondent, from the time of his institution, received the benefit of such augmentation. The Bishop had certified the value of the living into the first fruits office, but seven years before Lord *Tyrconnel* purchased the estate; which had been long enjoyed by his ancestors. The respondent had therefore every opportunity of knowing the value of the living; and as the certified value corresponded with the customary payment to the rector, no purchaser in the situation of the appellant's father, could require a greater security. When he made the purchase, intelligence was sent to the patrons of the living, that improvements of the estate were talked of, and that if tithes in kind could be had, the advowson would be valuable. This intelligence was in the respondent's custody; and the constant acquiescence in the ancient payment ever since, notwithstanding the improvements, was strong evidence that the certified value was unalterable. On the faith and credit of the value of the living, so ascertained by parliamentary authority, and confirmed by certain and uniform payments, improvements of the estate were made: On the same faith and credit, the appellant entered into covenants in his marriage settlement; and many purchasers for a valuable consideration, would be substantially prejudiced, if the value, at this distance of time, was to be altered, and the remedy was to be traced back against the heirs at law of Sir *John Brownlow*, who died in the last century.

Notwithstanding these circumstances, the respondent, in *Hilary Term*, 1769, exhibited his bill in the Court of Exchequer, against the appellant, setting forth, that on the 2d of *December* 1766, he was instituted and inducted into the rectory of *Ryfolm*, and thereby became entitled to all manner of tithes, oblations, obventions,

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obventions, and other ecclesiastical dues whatsoever within the said parish, and the titheable places thereof: That the appellant was owner and occupier of all the lands within the parish, to the amount of 2000 acres and upwards, and that the said lands were of the yearly value of 700*l*. And the bill prayed an account of the value of the titheable matters in the years 1767, and 1768, and payment of what should appear to be due on taking the account.

The bill was afterwards amended; but contained no allegation that tithes in kind had been ever paid or demanded: Nor was the circumstance of the augmentation of the living by Queen Ann's bounty disclosed by the bill, although it appeared from the respondent's allegations, that tithes in kind would increase the value of this living, beyond the value of any of the livings which were intended by the Parliament to have the benefit of such augmentation.

The appellant, by his answer, admitted, that he was the sole owner and occupier of all the lands in *Ryfolm*; and said, that he was also the sole owner and occupier of another tract of land adjoining to *Ryfolm*, called *Grange de Lyngs*: But that the lands in *Ryfolm* contained only 671 acres, or thereabouts; and that the lands called *Grange de Lyngs* contained 759 acres, or thereabouts. He insisted, that the said tract of land, called *Grange de Lyngs*, or any part thereof, was not in the parish of *Ryfolm*; and submitted to the Court, that if it was within the parish, it was exempt from tithes, and was parcel of a dissolved monastery, and belonged to a religious order. As to the lands within the parish, the appellant insisted, that some ancient, lawful and valid composition real was made before the reign of Queen *Elizabeth*, by and between the parson, patron and ordinary of the parish; by virtue whereof a certain ancient payment of 15*l*. 10*s*. 1½*d*. to wit 15*l*. in money, was made payable half yearly, at *Lady-day*, and *Michaelmas*, in each year, to the rector of the said parish for the time being, and 10*s*. 1½*d*. residue of the said 15*l*. 10*s*. 1½*d*. was to be paid to the Archdeacon of *Stowe*, within the diocese of *Lincoln*, for procurations and synodals yearly, and which had been paid from ancient time before the reign of Queen *Elizabeth*; to wit, from the time of making such real composition, by the owner for the time being of all the lands within the parish (except

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Grange de Lyngs) in lieu and full satisfaction of all tithes whatsoever, offerings, oblations, obventions and other ecclesiastical dues, possessions and rights whatsoever, yearly arising, renewing, increasing or payable, upon or from all lands within the said parish, or the titheable places thereof, or belonging to the said rectory; and which said ancient payment of 15*l.* had been constantly and regularly paid, for a long series of years to *Michaelmas*, 1766, to the rectors of the parish for the time being, or to some other person for their use, and by them, together with the payment of the said 10*s.* 1*d.* in manner aforesaid received, taken and accepted, during the time aforesaid, in full satisfaction, and in lieu of all tithes whatsoever, offerings, obventions, oblations and other ecclesiastical dues, possessions and rights, yearly arising, renewing or payable, within the said parish of *Rysolem*, exclusive of *Grange de Lyngs* aforesaid, and the titheable places thereof, or belonging to the said rectory. And the appellant submitted to the judgment of the Court, that the said annual payment was an effectual bar against any demand of tithes in kind; and believed it was so understood at the time of his father's treaty for the purchase of the said estate; and that neither the respondent, or any of his predecessors, in the memory of any person living, had ever performed any religious duty within the said parish.

The respondent replied to the answer, and divers witnesses having been examined, and their depositions duly published, the cause came on to be heard before the Lord Chief Baron, Mr. Baron *Adams*, and Mr. Baron *Perrott*, on the 12th and 14th of *December*, 1772, when the Court was pleased to observe, that the question, Whether *Grange de Lyngs* was in the parish of *Rysolem* or not, was a question of fact proper for the determination of a jury on an issue at law; which was not objected to by the counsel on either side. And as to the question concerning the composition real, it was objected by the respondent's counsel, that the appellant ought not to be admitted to give any other proof of it, than the production of the instrument under the hand and seal of the bishop and the other parties; but this objection being over-ruled, a variety of evidence was produced on the part of the appellant, and an office copy from the first fruits office of the Bishop's certificate, and some old accounts of Lady *Brownlow*'s steward, before the time of the said certificate, and several vouchers

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vouchers to the said accounts, which were casually preserved in the mansion house at *Belton*, and receipts for money paid to several successive rectors, and for synodals and procurations, and a receipt for the outgoings which had been repaid by Lord *Tyrconnel* out of the purchase money, and the depositions of several witnesses were read on behalf of the appellant; but the respondent's case was rested on objections to the rankness of the composition real insisted on by the appellant, and the insufficiency of the evidence in support of it. After arguments at the bar, the question concerning the composition was thought proper for the determination of a jury on another issue at law; one of the barons however, declared his inclination at first to dismiss the respondent's bill on this part of the case, but he afterwards acquiesced in abiding the event of an issue at law, to which the former part of the case had been referred: And it having been declared by the Court, that the *Lent* assizes would be inconvenient for the trial of the issues; it was thereupon decreed, that it should be referred to a trial at law, to be had upon the two following issues; *viz.* first, "Whether the lands called *Grange de Lyngs* were in the parish of *Rysolm*?" Secondly, "Whether such ancient lawful and valid composition real, was made before the reign of *Queen Elizabeth*?" These issues were directed to be tried at the then next summer assizes for the county of *Lincoln*, by a special jury; and the consideration of costs, and all other directions, were reserved till such trial should be had.

The two issues being settled conformably to the decree, no further steps were taken till the 15th of *July* 1773, when the Court had almost finished their last sittings before the long vacation; and then the respondent having applied by motion, that certain exhibits might be produced by the appellant, the Court made an order, that all deeds, books, papers and writings relative to the matters in question, in the custody or power of either party, should be forthwith produced on oath before the deputy Remembrancer, with liberty to take copies respectively. And after this order, the respondent gave notice of trial at the ensuing assizes. But on the 17th of the same month, the Court varied the order, by directing the deeds, books, papers and writings to be produced at *Lincoln*, on or before the 14th of *August*, being the first day of the assizes.

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On the 19th of the same *July*, the respondent countermanded the notice of trial which he had given two days before, and did not proceed to try the issues.

On the first day of *Michaelmas* Term 1773, the respondent applied to the Court, by motion, to discharge that part of the order of the 17th of *July*, which related to the production of deeds, &c. at *Lincoln*, and that they should be produced on oath, and left with the deputy Remembrancer, on or before the first day of *Hilary* Term, for inspection, and with liberty to take copies; and that the time for trying the issues might be enlarged to the then next *Lent* assizes. And the same day the appellant moved, that the issues might be taken *pro confesso* against the respondent, he not having proceeded to trial as directed by the decree.

On the 16th of *November* the two motions were heard together, when the Court made an order for the production of all deeds, books, papers and writings before the deputy Remembrancer, according to the respondent's application, and enlarged the time for the respondent to proceed to the trial at law, till the then next *Lent* assizes.

Many variations were afterwards made in the order for production of papers and writings, and the respondent having left with the deputy Remembrancer ten large folio manuscript books of account, belonging to the Master and fellows of *Baliol* College in *Oxford*, (upon whose presentation the respondent had been instituted to the said sinecure) which books it was impossible for the appellant or his agents to peruse within the time allowed by the order for the inspection; therefore, on the 4th of *February* following, the appellant applied to the Court, by motion, that the time for trial of the issues might be enlarged to the following summer assizes, which at the time of the decree was judged the most convenient season of the year for such trial, and that the respondent might point out such parts of the said manuscript folio books, as he intended to give in evidence, or otherwise that the time for inspection might be enlarged to the first day of the then next *Easter* Term; but the Court denied the motion, and ordered that the appellant should pay the costs of the application.

The appellant having no intention to evade the trial of the issues, but trusting that when they were tried, the questions would be at rest, acquiesced in the several orders which the Court had made on the respondent's application, notwithstanding the unexpected denial of the last motion, with costs.

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On the 25th of *March* 1774, the issues came on to be tried before Mr. Justice *Blackstone*, and a special jury of the county of *Lincoln*; and after some time spent on the trial of the first issue, it was proposed by the Judge, and agreed to by the counsel on both sides, that the first issue should be tried on that day, and that the trial of the second issue should be deferred to the day following. The trial lasted many hours on each day, and the jury, after withdrawing and taking time to consider of their verdict, found for the appellant on each of the issues.

On the first day of *Easter* Term 1774, the respondent moved the Court for a new trial of both the issues; and on the last day of the term, the report of Mr. Justice *Blackstone* having been read, (in which he stated the evidence on both sides, without giving any opinion on the verdict upon the first issue, but expressed himself in a manner which imported his disapprobation of the verdict on the second issue) the Court ordered, that a new trial should be had of the issues directed by the decree, at the next assizes for the county of *Lincoln*, by a special jury of the said county, on payment of costs to be taxed.

From this order Mr. *Chaplin* appealed, and he afterwards applied, by motion to the Court of Exchequer, for a copy of Mr. Justice *Blackstone*'s report; but the Court did not think proper to comply with such application.

In support of the appeal, it was said, that the ancient and invariable payment of a certain sum of money in lieu of tithes, which was proved in the cause without contradiction, and without any proof, tradition, or even allegation, that tithes in kind were ever paid or demanded in former times, was so strong an objection to the respondent's claim, that on his refusal to proceed to trial, at the time expressly directed by the decree, the issues might have been taken *pro confesso* against him. He had every indulgence which could reasonably be expected; and after

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ter a fair and impartial trial, he ought to have acquiesced in the verdict. A further litigation at law might answer the purpose of vexation and expence, but could not be desired from motives of justice. A new trial of either of these issues, could not be supported on any of the grounds upon which Courts of Equity have ever granted new trials; for there was no imputation on the characters of the jurors; nor any charge of partiality against any of them; it had not been contended, that the verdict was against law, or founded on facts which were contradicted, or that any new evidence had been discovered, or could be expected.

But the only objection to the verdict, and the sole ground for setting it aside, was, that it was contrary to the opinion of the Judge who tried the cause, and who appeared, by his report, to have been dissatisfied with it.

To this objection it was answered, I. That it could not affect the verdict on the first issue, with which the Judge did not express any dissatisfaction; and as to the second issue, the objection was immaterial from two considerations. 1st, From the nature of the question before the jury. 2d, From the decree in the cause. The question did not depend on various and contradictory evidence, but on facts neither contradicted by witnesses, or denied by either of the parties. The inference and presumption from these facts was the only question before the jury, and they were the only proper judges of it. And if in such a case, the opinion of a judge differing from a jury, is a ground for a new trial, there must be a failure of justice; for the order for a new trial amounts to a declaration of the Court, that the former jury drew a wrong conclusion from the facts before them, which is, in other words, a *direction* to the new jury what verdict they must find on the same facts. The evidence before the judge at the assizes, had been previously considered at the hearing of the cause, by competent judges of every question within the province of a judge: They directed the issue, for the purpose of taking the sense of a jury; but this direction would have been nugatory, if the sense of a jury was to be over-ruled by the opinion of a Judge. And on this ground of objection, the order for a new trial was inconsistent with the decree. But II. There was not in fact, any ground for the judge's dissatisfaction

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faction with the verdict, on either of the issues. As to the first issue, the respondent undertook to prove, that the lands called *Grange de Lyngs*, were in the parish of *Ryfolm*; but he did not offer any of the legal proof, usually required of such a fact. He gave no evidence of *perambulation*, *payment of parochial rates*, or *service of parochial offices*. The whole of his evidence, which was left by the judge to the consideration of the jury, rested on a single deed; and if a description in a deed is conclusive evidence of the extent of a parish, which cannot be admitted, the whole arose from conjecture, that a parcel of land described in the deed, by the name of *Lyngs*, *within the parish of Ryfolm*, must necessarily mean *Grange de Lyngs*; though, in the same deed, *Grange de Lyngs* is, *eo nomine*, distinguished from *Lyngs in Ryfolm*, and is not mentioned in any part of the deed to be in the parish of *Ryfolm*. The jury were so desirous of doing justice, that they withdrew with the deed at their own request, though their inspection of it was strongly opposed by the respondent's counsel; and if no evidence had been given on the part of the appellant, there would be no ground to contend that a different verdict ought to have been found. As to the second issue, it was clearly proved, that the yearly payments in lieu of tithes, had been invariably made for a great length of time; and nothing was in question, but the conclusion from this fact. It cannot admit of a doubt, that every *modus* supposes a *real composition*, though the original instrument is not extant; and the presumption of the jury, that such an instrument existed, though lost or destroyed by length of time, was warranted by many great and respectable authorities. This presumption was not destroyed by contrary proof, but only opposed by arguments, that the composition might probably be of a later date than the disabling statutes; in support of which arguments, a supposed rankness in the composition was much relied on; though the value of the estate in former times was not proved, but estimated by conjecture only. A distinction was however taken between the plea of a *modus* and a *real composition*; but it has been held, that there is no necessity, either in law or equity, to use the word *modus*, it being a term *not necessary in pleading*.

The construction, which the learned Judge who tried the cause, put upon the second issue, created much perplexity at

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the trial. The appellant by his answer had insisted, that the tract of land, called *Grange de Lyngs*, was *not* in the parish of *Ryfolm*; and this point was the object of the first issue: And he also thereby insisted, that if *Grange de Lyngs* was within the parish, it was exempt from tithes, for the reasons therein mentioned; and therefore he laid the composition real in lieu of tithes, &c. for all lands in the parish of *Ryfolm*, except *Grange de Lyngs*. This provisional exception was necessary in the answer to the bill; but standing in the second issue, as directed by the Court, after the verdict on the first issue had severed *Grange de Lyngs* from the parish, the learned judge adhered to the *mere letter* without attending to the *true meaning* of the issue; and considered the exception of *Grange de Lyngs* in the second issue, as inconsistent with the verdict on the first issue, and consequently rendering it impossible, in his opinion, for the jury to find a verdict for the appellant in the *strict terms* of the second issue. But it was submitted, that the exception in the second issue being provisional, or conditional only, if the jury had found that *Grange de Lyngs* was within the parish, the true meaning was no more than this, that the jury at all events should not consider *Grange de Lyngs*, whether in the parish or not, as covered by the composition; the word *except* being in this, as in some other instances, synonymous with the words *not including*; and therefore this objection, being founded on a grammatical nicety, and contrary to the merits of the case, was not a sufficient ground for a new trial of that issue. But if the House should be of a contrary opinion, the appellant hoped, that the second issue should, in that case, be varied in such a manner as to leave the question indisputably open for a second trial upon the merits, free from the objection taken by the learned judge to the form of the second issue as it now stood. And it was also hoped, that as this objection went only to the second issue, the verdict on the first issue would remain.

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On the other side it was insisted, that the verdict on the first issue was given contrary to evidence, the grant of the 30th of September, 30 Hen. VIII. being conclusive evidence to prove, that the lands called *Grange de Lyngs*, were at that time in the parish of *Ryfolm*; and no evidence was offered on the part of the appellant, to shew that they had been at any subsequent time separated. That the verdict upon the second issue was wholly unsupported

supported by any evidence produced by the appellant; the mere proof of payment from the reign of Queen *Ann*, and the value of the living at that time, not being sufficient evidence of a real composition made before the reign of Queen *Elizabeth*, or of an uniform payment during that long period; and if there had been any weight in such evidence, it was entirely destroyed by the respondent's evidence, which proved, that in the 26th of *Hen. VIII.* the reputed value of the living was only 4*l. per ann.* That soon after the year 1599, the value of the living was returned by four neighbouring clergymen to the Bishop, to be only 10*l. per ann.* That in 1601, the state of the living appeared from a terrier, to be very different from that contended for by the appellant; and not consisting of a bare annuity of 15*l.* a year, clear of procurations and synodals, as alledged in this issue. That the verdict on both the issues, was contrary to the opinion of the learned judge who tried the cause, as appeared by his report; and under these circumstances, the inheritance of the church ought not to be bound by a single verdict. That the cause originated in the Exchequer, and the issues were directed for the information, and to satisfy the conscience of that Court; but the conscience of the Court still remained unsatisfied, and therefore all the Barons had been unanimously of opinion, upon solemn argument, and full consideration, that a new trial ought to be granted.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that so much of the order complained of, as directed a new trial of the first issue, should be reversed: And that so much of the said order as directed a new trial upon the second issue, should be affirmed: And it was further ORDERED, that the Court of Exchequer should give all proper directions, for carrying this judgment into execution.

ORDER
reversed.
in part.
M. S. Jour.
sub anno 1774.
P. 333.

Robert

Case 24. *Robert Ryves Fitz Edward,* - Appellant.
William Ryves, Esq; and others, - Respondents.

13th March, 1775.

WILLIAM RYVES, Esq; being by virtue of a recovery he suffered in 1693, seised in fee of the town and lands of *Lyckelly*, containing 172 acres, and of 76 acres in the town and lands of *Corbally*, and 147 acres of profitable, and 50 acres of unprofitable land in *Ballylooba* and *Garrentrumpa*, in the county of *Limerick*, and having issue *Robert* his eldest, and several other sons; by indenture dated the 24th of *June*, 1698, made between himself and *Bridget* his wife, and *Robert Ryves* his eldest son, of the one part; and *Charles Oliver* and *Abraham Green*, of the other part; he conveyed all his estate to *Oliver* and *Green*, and their heirs, to the use, as to the particular lands before mentioned, of them and their heirs, until the sum of 473*l.* 18*s.* with interest, should be paid out of the rents and profits thereof to the persons therein named; and after such payment, to the use of himself for life, *sans* waste; remainder to *Robert Ryves* his eldest son for life, *sans* waste; remainder to his first and every other son successively in tail male, with divers remainders over; remainder to his own right heirs. And after limiting other estates to his other sons severally in remainder after his death, the deed provided, that *Bridget* should, after the death of *William* her husband, receive out of the lands of *Lyckelly*, an annuity of 40*l.* for her life; and that *Robert Ryves* should have power of charging the lands so limited to him, with 500*l.* for daughters portions, if he died without male issue, and of settling 60*l.* a year jointure, on any wife he should marry.

William Ryves died in 1705, whereby *Robert* his eldest son, became seised for life of the lands so limited to him; and by lease and release, dated the 1st and 2d of *January*, 1718, between himself of the one part, and *Rawlinson Foord* of the other part, without taking any notice of the settlement of 1698, but reciting, that *William Ryves* the father, had by feoffment, dated the

the 7th of *December*, 1668, conveyed to *John Travers* and *Thomas Coakley* and their heirs, the town and lands of *Lyckelly*, one-half of the town and lands of *Corbally*, and the town and lands of *Garrentrumpa*, to the use of himself and *Sophia* his then wife, for their lives and the life of the survivor, for the jointure of *Sophia*; and after their deceases, to the heirs male of *William*, with other remainders over; and also reciting, that *William* and *Sophia* were dead, that *Robert* was the son and heir at law of *William* by *Sophia*, *Robert* in consideration of 1000*l.* paid to him by *Rawlinson Foord*, did thereby convey to *Foord* his heirs and assigns for ever, the last mentioned lands, subject to a proviso of redemption on payment of 1000*l.* with interest at 7*l. per cent*: And *Robert Ryves* thereby covenanted to levy one or more fines, and suffer one or more recoveries, in the then next *Hilary Term*, to the use of *Foord*, his heirs and assigns, for better securing the payment of the 1000*l.* and interest.

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Robert Ryves on the 29th of *June*, 1723, (the respondent being then under age) borrowed of *Edward Croker*, the respondent's guardian, 198*l.* 18*s.* 2*d.* of the respondent's money, for securing whereof, he gave bond to *Croker*, with a warrant of attorney to confess judgment thereon, which was accordingly entered up in the Court of Exchequer; and on the 17th of *October*, 1724, he borrowed of *Croker* 300*l.* more of the respondent's money, for which he gave *Croker* another bond, with a warrant of attorney to confess judgment thereon, which was likewise entered up in the Court of Exchequer; and *Croker* by indorsements on each of the bonds, declared them and the judgments to be in trust for the respondent.

Robert Ryves being indebted to several persons in the year 1724, prevailed upon *Robert* his eldest son, then of age, to join with him in suffering a recovery of the lands settled by the deed of 1698, and soon after the father and son by lease and release, dated the 13th and 15th of *February*, 1724, reciting the recovery, in consideration of 1000*l.* mentioned to be paid to them by *Arthur Lord Doneraile*, but which was paid to *Robert* the father only, mortgaged to his Lordship the towns and lands of *Lyckelly* and *Garrentrumpa*, with a proviso of redemption upon repayment by either father or son, of 1000*l.* and interest, at 6*l. per cent.* on the 15th of *August* then next.

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Robert Ryves the father, on the 8th of *November*, 1726, borrowed 1000 *l.* of *Edward Croker*, in his own right; for securing whereof, *Robert Ryves* the father, and *Robert* his son, together with *Kilner Brazier*, entered into a bond to *Croker*, and executed warrants of attorney to confess judgment thereon; and in *Michaelmas* Term, 1726, three separate judgments were entered against *Robert* the father, *Robert* the son, and *Kilner Brazier*.

Robert Ryves the father, by thus involving his son, becoming sensible of the power he had over him, prevailed on him to join in a voluntary settlement of his estate; and by lease and release, dated the 16th and 17th of *February*, 1726, between themselves of the one part, and *William Ryves*, *Edward Moore*, and *Richard Mansell*, of the other part, reciting, that *Robert Ryves* the father, being but tenant for life of the several lands therein mentioned, with remainder to *Robert* the son, and the heirs male of his body; and having occasion for 1000 *l.* had applied to *Robert* his son, to join with him in securing the same by mortgage on the said lands; that *Robert* the son had, in compliance with his father's request, joined with him in a fine and recovery for securing the payment of 1000 *l.* to Lord *Doneraile*, but that it was agreed, that the lands should only be a security for such 1000 *l.* and that the fine and recovery, after payment thereof, should enure to the use of *Robert* the father for life, remainder to *Robert* the son for life, remainder to his first and every other son, and the heirs male of their bodies, with several remainders over; subject to a provision for the wife of *Robert* the father, and portions for his other children: Therefore, in execution of that agreement, *Robert Ryves* the father, and *Robert* the son, did grant and release the said several lands, and all others wherein *Robert Ryves* or his said son, had any estate of freehold or inheritance in possession, remainder or expectance, unto the said *William Ryves*, *Edward Moore* and *Richard Mansell*, and their heirs, to the use of *Robert* the father, for life *sans* waste; remainder to *Robert* the son, for life *sans* waste, subject to an annuity or yearly rent of 80 *l.* *per ann.* to *Elizabeth* his mother, and the charges for younger children therein after expressed; remainder to the first and other sons of *Robert* the son in tail male successively; remainder to *Edward Moore Ryves*, second son of *Robert* the father, for his life, *sans* waste, remainder to the first and other sons of *Edward* successively in tail male; re-
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mainder to *Robert Ryves* the father, and the heirs male of his body; remainder to his right heirs for ever. This deed then declared, that the recovery should enure to the above uses; and that in farther pursuance of the agreement, the trustees should stand seised of the premises, to the intent, that *Elizabeth*, the wife of *Robert* the father, should after his death receive thereout, during her life, a yearly rent of 80*l.* in satisfaction of all dower and jointure; and a power was thereby given to *Robert* the father, of charging the lands with 800*l.* for the portion or maintenance of his younger child or children by the said *Elizabeth*; and also a power to *Robert* the son, and *Edward Moore Ryves*, if dying without male issue, to charge the premises respectively with 300*l.* for daughters portions, and to settle 100*l.* jointure on their wives; *Robert* the father warranting the lands to be free from incumbrances, except the 1000*l.* mortgage to Lord *Doneraile*, and other debts not exceeding 1500*l.* for payment whereof, *Robert* the son, and others stood bound with him.

The 1000*l.* debt, for which *Robert Ryves* the father had procured his son and *Brazier* to be bound to *Croker*, remaining unpaid, and one *John Ryves* being likewise security for him for another debt of 200*l.* *Robert* the father, to free himself from these and other debts, amounting together to 2,500*l.* again exerted his power over his son, prevailing on him to enter into a new agreement, by other indentures of lease and release between them, of the 10th and 11th of *March* 1728, reciting the former; and farther, that *Robert* the son, with *Kilner Brazier*, were security for 1000*l.* that the college lease of *Corbally*, was mortgaged for 300*l.* that *John Ryves* was security for 200*l.* that the debts of *Robert* the father amounted in the whole to 2,500*l.* that it had been agreed between them, that *Robert* the son should pay off the said debts of 2,500*l.* and save harmless *Robert* the father, *Kilner Brazier*, and *John Ryves* therefrom; that 100*l. per ann.* should be issuing out of the premises to *Robert* the father, for life; and that in consideration of his son's paying the said 2,500*l.* and indemnifying him, and *Kilner Brazier* and *John Ryves*, from their said engagements, and to enable the son to pay the 800*l.* to the father's younger child or children, as also the 100*l. per ann.* to the father for his life, *Robert* the father should convey the said freehold lands

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to the son, during his the father's life, and assign to him his interest in the college lease, subject to the rents and covenants therein contained: Therefore *Robert* the father, in consideration of the payment of the said debts of 2,500 *l.* by *Robert* the son, and of the yearly rent charge of 100 *l.* to *Robert* the father, during his life, and of the payment of 800 *l.* to the younger children of *Robert* the father, and of the performing all the covenants and agreements in the deed of the 17th of *February* 1726, did convey all the said freehold lands to *Robert* the son, and his assigns, during *Robert* the father's life, without impeachment of waste; subject nevertheless, to the payment of the 1000 *l.* mortgage money and the interest due to Lord *Doneraile*, and subject to the immediate payment of the 800 *l.* to the younger child or children of *Robert* the father, or such of them as he should appoint, and for want of appointment, equally among the daughters of *Robert* the father, living at his death; and subject to all other the covenants and agreements in the said deed of the 17th of *February* 1726, and also to the covenants and agreements in this deed; and further reciting a lease from the Provost, Fellows and Scholars, of *Trinity* College, *Dublin*, dated the 19th of *February* 1721, to *Robert* the father, of the lands of *Ballyscadane*, containing 24 acres or thereabouts, and one moiety of *Corbally*, containing 72 acres, 3 roods and 20 perches, or thereabouts, in the barony of *Costlea*, in the county of *Limerick*, for 21 years from the 1st of *November* then last; *Robert* the father, in consideration of 5 *s.* thereby assigned to *Robert* his son, all his estate, right and interest, in the lands demised by the said lease, for the residue of the said term of 21 years, subject to the rents and covenants of the lease, and to the mortgage of 300 *l.* affecting the same: And *Robert* the son, in consideration of the assignment to him of the said freehold lands, thereby granted 100 *l.* per ann. to *Robert* the father, and his assigns during his life, to be issuing out of those lands by quarterly payments, with power of distress; and *Robert* the son, for himself, his heirs, executors, administrators and assigns, covenanted with *Robert* the father, to pay his said debts, amounting to 2,500 *l.* and to indemnify him, *Kilner* *Brazier* and *John Ryves* therefrom, and also to indemnify him from the rents and covenants in the said lease.

Thus *Robert Ryves* the son became obliged to pay his father's debts, to the amount of 2,500 *l.* besides 800 *l.* to his father's younger

younger children, which with 422 *l.* 10 *s.* remaining unpaid of *Foord's* mortgage, made 3722 *l.* 10 *s.* in the whole, the yearly interest whereof at 6 *l.* 10 *s.* *per cent.* (though part of the debts were at 7 *l.* *per cent.*) amounted to 241 *l.* 19 *s.* which, added to the annuity of 100 *l.* that *Robert* the son was to pay the father for his life, made 341 *l.* 19 *s.* a year; whereas the lands, if computed at an average of 12 *s.* an acre, being then a high price for them, would produce but 305 *l.* 8 *s.* a year, out of which a quit rent of 5 *l.* 15 *s.* 11 *d.* a year, and 4 *l.* a year payable for some glebe land being deducted, the clear rent would be 295 *l.* 12 *s.* 1 *d.* only, which was less by 46 *l.* 6 *s.* 11 *d.* a year, than *Robert* the father's annuity, and the interest of his debts and incumbrances amounted to.

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Robert the father, at the time of executing the deeds of *February* 1726, and *March* 1728, was indebted to several other persons by bonds and judgments, to a considerable amount, not taken notice of in either of those deeds; the former of which not being registered till the 25th of *June* 1730, and the latter not till the 22d of *April* 1730, he contracted farther debts by bonds and judgments, between the executing and registering the deeds, for which *Robert* his son was a security.

Robert Ryves the father, in pursuance of the power reserved to him by the deed of the 11th of *March* 1728, charged the premises with 500 *l.* part of the 800 *l.* therein mentioned, for *Catherine Baker* his daughter, by *Elizabeth* his wife, and directed the 500 *l.* together with the interest at 7 *l.* *per cent.* to be vested in *Kilner Brazier* and *Edward Moore*, in trust for *Hugh Baker*, and the said *Catherine* his wife; and by another deed of the 30th of *July* 1731, he also charged the premises with 300 *l.* the remainder of the 800 *l.* appointing the 300 *l.* to be paid, with the like interest of 7 *l.* *per cent.* to his younger son *Edward Moore Ryves*, who assigned it to *Ambrose Congreve*, Esq.

Upon Lord *Doneraile's* death, the 1000 *l.* mortgage due to him, became vested in his son and executor, the Honourable *Hayes St. Leger*; and there being in the year 1735, 200 *l.* for interest due thereon, Mr. *St. Leger* filed his bill in the Court of Chancery to foreclose the mortgage; whereupon *Robert Ryves*

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the father, and *Robert* the son applied to the respondent, to advance the 1200*l.* on an assignment of the mortgage, which he agreed to do; and accordingly by lease and release, dated the 16th and 18th of *August* 1735, Mr. *St. Leger*, in consideration of 1200*l.* assigned Lord *Doneraile's* mortgage to *Francis Gore*, his heirs and assigns, in trust for the respondent.

The mortgage to *Foord* upon his death became vested in *Elinor*, his only daughter and heir at law, afterwards the wife of *Cornelius Callaghan*, who being *Foord's* administrator, he and his wife, in the year 1736, recovered by ejectment the possession of the mortgaged premises; on which *Robert Ryves* the father, and *Robert* the son again applied to the respondent to advance 422*l.* 10*s.* then due on that mortgage, which the respondent at their request also agreed to do; and in 1737, took an assignment of the mortgage from *Callaghan* and his wife, in the name of *Robert French* his trustee. And he afterwards paid *John Croker*, the executor of *Edward Croker* his father, the principal and interest due on the several judgments recovered by him against *Robert Ryves* the father, *Robert* the son, and *Kilner Bragier*; in consequence of which, the judgments were assigned to *Thomas Mansell*, in trust for the respondent.

Robert Ryves the son being greatly involved by his engagements for his father, and the debts affecting the estate bearing a very high interest, of which there was a large arrear unpaid; and these with the growing interest, together with the 100*l.* a year payable to his father for life, and the 80*l.* a year to his mother, should she survive the father, and the 800*l.* payable to the father's younger children, being more than the estate would bear, whereof *Robert* the father and *Robert* the son being fully sensible, they applied to and frequently solicited the respondent to become a purchaser of the estate; whereto he the more readily agreed, from the considerable sums due to him; and accordingly, *Robert* the son and the respondent entered into articles, dated the 3d of *June* 1738, reciting, that the respondent had two mortgages assigned to him for several considerable sums on the lands of *Lyckelly*, *Corbally* and *Garrentrumpa*, and had likewise a mortgage of the college lease of the lands of *Corbally*, which had been perfected to him in trust for *Robert Ryves* the son; that *Alice Craven* had obtained several judgments against

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Robert the son and his father, for large sums of money, and that *John Croker* had also obtained two judgments against them for considerable sums; that *Robert* the son had agreed to convey the fee simple and inheritance not only of the lands of *Lyckelly*, *Corbally* and *Garrentrumpa*, but likewise the lands of *Ballinlooba*, and to assign over to the respondent the said college lease, in order to discharge the said several debts; and that the remainder of the purchase money, after discharging those debts, should be paid to *Robert* the son: He therefore covenanted with the respondent, before the 1st of *July* then next, to execute proper and effectual deeds for conveying the fee simple and inheritance of the lands of *Lyckelly*, *Corbally*, *Garrentrumpa* and *Ballinlooba* to the respondent, his heirs and assigns for ever; and likewise for assigning to the respondent, his the said *Robert* the son's right and interest in the said lease; in consideration whereof, the respondent covenanted to pay the sum of 7000*l.* in discharge of the several debts in the agreement mentioned, which should affect the lands, and to pay the remainder to *Robert* the son. But the respondent being afterwards advised to purchase under a decree of a Court of Equity, he on the 11th of *February*, 1740, filed his bill in the Court of Exchequer in *Ireland*, against *Robert Ryves* the father, and *Robert* the son, for a foreclosure, and that the lands might be sold for payment of what was due to him.

Edward Moore Ryves, the youngest son of *Robert* the father, and next remainder man by the deed of *February* 1726, to *Robert* the son and his male issue, died in *April* 1741, leaving the appellant his only son then an infant.

The respondent, at *Robert Ryves* the son's request, paid 763*l.* 9*s.* 3*d.* remaining due to *Hugh Baker*, in right of *Catherine* his wife, under *Robert* the father's appointment; whereupon *Baker*, with *Brazier* and *Moore* the trustees, and *Robert Ryves* the father, and *Robert* the son, by indenture dated the 3d of *October* 1743, assigned all their right and interest therein to *Robert French*, in trust for the respondent, to whom *Robert* the son proposed soon after to assign his right and interest in the college lease, which had been renewed in the respondent's name, the former leases as to part of the lands demised belonging to him; and accordingly, on the 22d of *February* 1743,
Robert

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Robert the son, in consideration of 195*l.* released all his right therein to the respondent.

The respondent apprehending his suit for sale of the estate would be expensive, and attended with great delay, declined proceeding therein; but desirous to ascertain what was due to him for principal and interest on his said several securities, he on the 28th of *February* 1743, filed an amended bill, which *Robert* the son answered, setting forth the particular sums due to the respondent, and admitting that the same with the interest thereon, including the costs of the judgments, amounted to 5448*l.* 15*s.* 1*d.* In consequence of which, the respondent proceeded to carry into execution the agreement of the 3d of *June* 1738, for the purchase of the lands; but *Robert Ryves* the father insisting on being paid thereout his life annuity of 100*l.* and *Elizabeth* his wife claiming her life annuity of 80*l.* if she survived him, *Robert* the son was willing that the lands should be conveyed to the respondent, subject to those annuities to his father and mother; and therefore agreed with the respondent to value the annuities at 950*l.* and to deduct that sum out of the 7000*l.* purchase money, whereby it was reduced to 6050*l.* and accordingly, by lease and release, dated the 28th of *February* and 1st of *March* 1743, made between *Robert Ryves* the son and *Richard Hull*, as trustee for the respondent, *Robert* the son, in consideration of 6050*l.* conveyed to *Richard Hull*, his heirs and assigns for ever, all the town and lands of *Lyckelly*, and the other freehold lands, and all his estate, right and interest therein; thereby covenanting, that the lands were free from all incumbrances, except the mortgages, judgments and charges in the schedule thereto annexed mentioned; and that it should be lawful for *Richard Hull*, to apply so much of the consideration money of 6050*l.* in discharge of the mortgages, judgments and charges in the schedule, as would be sufficient to discharge them; and that the remainder only of such purchase money should be paid to *Robert Ryves* the son; it being thereby declared to be the intent of the parties, that the premises should be and remain to *Richard Hull*, his heirs and assigns, free of all incumbrances, save as above; and that it should be lawful for *Hull*, his heirs and assigns, to take assignments of the said several mortgages, judgments and charges, as the same should be paid off, and to keep them respectively on foot, for the protection of his purchase.

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The respondent not only paid the debts mentioned in the schedule, amounting to 5752*l.* 11*s.* 9*d.* but farther paid, in discharge of several judgments affecting the premises, and to the payment whereof *Robert* the father and *Robert* the son were both liable, several sums amounting to 1926*l.* 13*s.* 3*d.* which being added to the 5752*l.* 11*s.* 9*d.* the amount of the schedule debts, brought up the whole paid by the respondent, to 7679*l.* 5*s.* which was 679*l.* 5*s.* more than the purchase money.

Robert Ryves the father died in 1751, and *Robert* the son in 1753, without issue male, leaving *Elizabeth* his widow, and three daughters.

Although the respondent had, at *Robert* the son's death, been in possession of the lands so purchased, from the time of the sale and conveyance to him, of the 1st of *March* 1743, yet *Robert* the son's widow and daughters on the 3d of *February* 1756, near three years after his death, filed a bill in the Court of Exchequer in *Ireland*, against the respondent, to which the appellant was also made a defendant, charging, that *Robert* the son, some time before his death, by deeds dated the 18th and 19th of *December* 1753, had, pursuant to the power reserved to him by the release of *February* 1726, charged the premises with an annuity of 30*l.* to his widow for life, and with 300*l.* to his daughters; that upon his death without issue male, the lands became vested in the appellant; and praying, that the 30*l.* a year and 300*l.* might be decreed to be paid to them.

On the 22d of *May* 1756, the respondent put in his answer, thereby insisting, that the deeds of *February* 1726 were voluntary and void as against him, who was a creditor and a purchaser for a valuable consideration; and that the power under which the then plaintiffs claimed the 30*l.* a year, and 300*l.* being created by those voluntary deeds, ought not to be enforced against him.

The appellant, at the commencement of this suit was near twenty years old; and then was, and had been for several years before, an articled clerk to *Thomas Baker*, the attorney employed by the widow and daughters of *Robert* the son, who conducted and managed the suit against the respondent; whereby the

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appellant saw, transcribed, and read the bill, answers, and all the proceedings in the cause; in the course of which the respondent, in pursuance of an order made in *Easter Term* 1757, deposited with the proper officer of the Court, the deeds of *February* 1726, and *March* 1728, and the appellant read them, and obtained copies thereof.

The appellant, on the 10th of *July* 1757, attained his age of 21; and on the 12th of *October* following, of his own accord, and unexpected by the respondent, he came to the respondent's house, in company with Mr. *Augier*, a friend of his, and then informed the respondent, that he, the appellant, had been pressed to commence a suit against the respondent, for the estate purchased by him from his uncle *Robert Ryves*; which the appellant refusing to do, he was then solicited to assist *Robert's* widow and daughters, in the prosecution of their demands; which having also declined, he was made a defendant to the suit brought by them against the respondent, and at the same time the appellant declared over and over, that he was so well satisfied of the respondent's being a fair and honest purchaser, that if any release or confirmation from him could be required, he would at any time execute it.

About a month after this interview, the respondent arrived in *Dublin*, when the appellant again repeated to him his desire of doing whatever counsel should advise, for the confirmation of his title; whereto the respondent replied, that he would give directions for the purpose; adding, that as the appellant appeared so friendly, and had refused to join the widow *Ryves* and her daughters against him, and was therefore made a party to their suit, the respondent would not only give him 100*l.* but also indemnify him from all costs that he might be put to on account of that suit; and in consequence of the appellant's proposal, the respondent consulted in what manner his intention could be carried into execution; and being advised that the appellant might by deed, fine and recovery, confirm the title; the respondent communicated the instructions he had received to the appellant who approved the mode, and desired the respondent's counsel would prepare the deed accordingly; a draft of which being afterwards delivered to the appellant, he, after keeping it several days, returned it with his approbation, desiring it might be engrossed.

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grossed; and this being done, the appellant, after reading the ingrossment, and examining it with the draft, on the 21st of *November* 1757, executed the deed; whereby, after reciting the bill filed by the widow *Ryves* and her daughters against the appellant and respondent, in which was set forth the several above mentioned settlements; and reciting the respondent's answer to that bill, and also that the appellant having considered these matters, in order to prevent future suits or contests relative to the lands, on behalf of him or his issue, or any claiming under him or them, and in order to be indemnified from the costs attending the suits then instituted; had agreed, in consideration of 100*l.* paid to him by the respondent, to release, confirm and convey to the respondent and his heirs, all his the appellant's estate, right and interest in the premises: The appellant therefore, in consideration of 100*l.* paid him by the respondent, released, confirmed and conveyed to the respondent, his heirs and assigns, all the said freehold lands, and all his estate, right and interest therein; and covenanted to levy a fine and suffer a recovery of the premises, for the more effectual extinguishing and barring, to the respondent and his heirs, all the appellant's right or claim thereto, by force of any of the above settlements, or in any other manner whatsoever; the respondent thereby covenanting, to indemnify the appellant from all claims and demands of *Elizabeth* the widow and her daughters against him, and from all costs and expences of suit which he had been or might be put to on account thereof. And accordingly, in *Michaelmas* Term 1757, the appellant, in pursuance of the said covenant, duly levied a fine; and in *Hilary* Term following, which was near three months after the execution of this deed, he suffered a recovery of all the lands; both which were declared to enure, to the use of the respondent and his heirs.

Besides these deliberate acts, the appellant, on the 27th of *January* 1758, sent a letter from *Clonmore*, to Mr. *Franks*, the respondent's attorney in *Dublin*, inclosing a copy of a subpœna he had been served with at the suit of the widow *Ryves*, and desiring Mr. *Franks* to do what was proper therein; who immediately entered an appearance, and prepared a draft of an answer for the appellant; and in *March* following, the respondent himself received a letter from the appellant, telling him, that he had wrote to Mr. *Franks* for his answer to Mrs. *Ryves*'s bill, together

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together with a commission; and that he had sent for some things which the respondent had kept for him; concluding, that he saw the respondent's sons at *Clonmell*, who were well, and that he would have waited on him in person, but was obliged to be at the assizes of *Kilkenny*.

But notwithstanding all this, the appellant thought fit, on the 1st of *November* 1758, to file a bill against the respondent, and *William Ryves* and *Richard Mansell*, the surviving trustees in the deed of *February* 1726, pretending, that the respondent, by his civility and kindness to him, and by false representations, knowing he had no title to the lands in question, had prevailed on the appellant to execute the deed of confirmation, and levy the fine, and suffer the recovery to the respondent; and praying, that the respondent might account for the rents and profits of the premises, since the death of *Robert Ryves* the younger; that the fine, recovery and deed executed by him to the respondent, might be set aside; and that the respondent might reconvey the premises to the appellant, and deliver up to him the possession thereof.

To this bill the respondent put in a plea and answer, pleading in bar to the relief thereby sought, the several matters and deeds above set forth; and insisting, that the deeds of *February* 1726 and *March* 1728 were voluntary and void against creditors and purchasers; that the creditors had no notice of them, till they were registered in *April* and *June* 1730; that the respondent was a purchaser of the premises for a valuable consideration, and that the appellant being fully apprised of the above several facts and transactions, and of the respondent's title to the premises, executed the deed of confirmation thereof to the respondent; which he, by his answer, said was done by the appellant, in consequence of his own repeated offers to the respondent for that purpose, and without any means used by the respondent to induce him so to do.

This plea was argued on the 8th of *May* 1762, when it was ordered, that the benefit thereof should be reserved to the hearing of the cause, and the appellant was to be at liberty to except to the respondent's answer.

Pending this suit, the cause instituted by *Elizabeth Ryves* the widow and her daughters, was heard on the 23d, 27th and 28th of *April* 1763, when the Court ordered the bill to be dismissed, as against the respondent.

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The appellant's cause being at issue, witnesses were examined on both sides; and the trustees *Mansell* and *Ryves* dying, it was revived against Sir *William Evan Morres*, Bart. and Lady *Maria Juliana* his wife, and *Thomas Croker* and *Ann* his wife; Lady *Morres* and *Ann Croker* being the heirs at law of *Ryves* the surviving trustee; and coming on to hearing, the Court, on the 2d of *March* 1772, decreed, that the respondent's plea should be allowed, and the appellant's bill dismissed with costs.

From this decree the present appeal was brought; and on behalf of the appellant it was contended, that the true way of construing the deeds of 1726 and 1728, was to connect them together, they being both relative to the same matter, and executed by the same parties. These deeds contained an agreement for a family settlement, by which every branch of the family was provided for; which was immediately carried into execution by a transmutation of possession, and which possession continued for above 14 years under them. In reasonable family settlements, the precise consideration moving the parties, is not nicely examined into in Courts of Justice. In the present case, there were mutual considerations; and *Robert* the father, under both deeds taken together, was clearly to be considered as a purchaser, for a valuable consideration, of the remainders to his second son *Edward*, the appellant's father, and his issue. It could not with any degree of truth be said, that these deeds were voluntary with respect to *Robert* the son; inasmuch as he thereby obtained the immediate actual possession of the family estate in his father's lifetime, and a power of charging it with a jointure for his wife, and with portions for his daughters. By virtue of the deed of 1728, he acquired also the College lease of the *Corbally* estate, to which he had not any title before. But the respondent insists, that *Robert* the son made an absolute conveyance to him of the estate in question in 1743, pursuant to certain articles of agreement entered into in 1738; and that the purchase money was applied by him, in payment of debts due on mortgage and judgment. It did not appear, that any account of such debts was

A. Wedderburn.
J. Skynner.
W. Selwyn.

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ever stated and settled, antecedent to the conveyance in 1743. Had the whole transaction been fair and honest, there could have been little occasion for keeping the agreement of 1738 a secret. It answered no purpose but that of secrecy, that the respondent should take the conveyance afterwards in the name of *Hull*, and not in his own name; but how secrecy became necessary, if the transaction was such as would bear examining into, still remained to be explained. The truth was, that the conveyance in 1743, could have no other operation or construction, than that of a mortgage for securing the sums really advanced by the respondent. It is a general rule, *once a mortgage and always a mortgage*; and the respondent could be considered in no other light, than that of a mortgagee in possession, and as a trustee for the judgment creditors; no money having been proved to have been paid by him, for the assignments of the judgments. And the manner in which the respondent himself had treated his own case, shewed this sufficiently. In the character of mortgagee of the estate, he filed a bill of foreclosure in 1740. He amended this bill, by making considerable additions to it, in 1743, on the very day upon which the conveyance, now set up as an absolute one, was executed. Had it really been a *bona fide* purchase, and an absolute conveyance for a valuable consideration, where was the necessity or occasion of commencing any suit to foreclose?

But further: The respondent having lain in wait till the appellant attained 21, soon afterwards began to traffick with him, for a confirmation of the respondent's title to this estate; and by fraud and misrepresentation, the appellant was, in a few months after he came of age, drawn in to execute the deed of *November 1757*, having no counsel, attorney, or friend then present; for as to *Peter Augier*, he was a mere instrument and creature of the respondent's.—Young heirs are peculiarly under the care and protection of Courts of Equity; and nothing is more certain, than that Equity will grant relief against improvident bargains and agreements, entered into by them even when of age, as in *Lord Southampton's case* *. It is a principle in Equity equally clear, that if the party releasing or conveying is *ignorant* of his right, or if his right is concealed from him by the person to whom the release is made, these are good reasons for setting aside the release †. So if the deed contains *false suggestions*, it is

* 3 Peere Williams 129. under the title of *Osmond v. Fitzroy*.

† 1 Peere Williams 727.

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is a constant rule in Equity to set aside such deed. All these circumstances would be found to concur in the present case. At the time of executing the deed of 1757, the appellant was ignorant of the nature of his title; he was not informed by the respondent of his having been a mortgagee, or having filed bills of foreclosure in 1740 and 1743, nor of the value given by him. The appellant was also ignorant of the real value of the estate in 1757, which then produced 600*l. per ann.* And further, he was deceived by the false recitals in the deed; such as, "That the deeds of 1726 and 1728 were voluntary and fraudulent; that the respondent was a purchaser for a full and valuable consideration; and that he had paid the purchase money according to the deed of 1743." In a case so pregnant with fraud and imposition, the deed of *November* 1757, considering the manner in which it was obtained, and for what consideration, and how made up, did not give any additional strength to the respondent's case. And this deed being improperly obtained, it would follow of course, that the fine and recovery suffered in consequence thereof, must be set aside. And upon the whole it was apprehended, that the acts done by the appellant in 1757, could not stand in his way, if he would otherwise be entitled to relief; that the whole transaction was iniquitous from beginning to end; and that the original contract being fraudulent, no subsequent act could make it good.

On the other side it was argued, that *Robert* the son was, under the original settlement of 1698, tenant in tail; and by the recovery in 1724, which destroyed the uses of that settlement, but without any deed declaring new ones, he became seised of the fee simple and inheritance, subject only to the life estate of his father. Thus circumstanced, he joined with his father that same year, in the 1000*l.* mortgage to Lord *Doneraile*; and in *November*, 1726, joined him again, together with *Brazier*, in borrowing 1000*l.* of *Croker*, for which judgments were entered against all three; then came the deed of *February*, 1726, which was evidently calculated for deceiving creditors; for it concealed several other bond and judgment debts of *Robert* the father, besides those of 1500*l.* therein mentioned; and this deed, after it was executed, lay unregistered till *June* 1730, a space of between three and four years, during which *Robert* the father contracted several other debts by bonds and judgments,

J. Dunning.
A. Forrester.

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in which *Robert* the son joined as his security; another flagrant instance of the intended fraud. Then again, the several limitations of the deed itself to *Robert* the son, and others, were all evidently voluntary: *Robert* the eldest son, out of whose inheritance all the uses must arise, was, without the least consideration, turned into a bare tenant for life; and not only so, but made to provide for all his brothers, born or to be born. Such limitations were manifestly fraudulent and void against the respondent, both as a creditor, and as a purchaser for a full and adequate consideration. That the deed of *March* 1728, though little applicable to the appellants claim, stood however on no firmer ground than that of *February* 1726; and was but an increase of *Robert* the father's imposition upon his son. For the surrender of his life estate, and the assignment of a college lease, then mortgaged for its full value, he got from his son an annuity for life of 100*l.* and an undertaking to discharge his debts, to the amount of 2,500 *l.* besides a provision of 800 *l.* for his younger children, part whereof was actually paid. Thus was the son, through his filial piety, placed in a much worse situation, by this deed of *March* 1728, than he was before; and thus would this deed afford the respondent an additional support as a creditor, to the extent of his advance; but in fact, this last deed being equally voluntary with the former, was equally fraudulent and void as against the respondent. A father's voluntary settlement upon his children, otherwise unprovided for by him, may, when neither creditor, purchaser, or other having claim upon the father's estate is concerned, be carried into execution by a Court of Equity, as answering the father's natural obligation to provide for his descendants. But this obligation extends not even to the nearest collaterals; consequently no such settlement by one brother upon another, can be entitled to the aid of a Court of Equity; especially, such as that now in question, where among the several impositions put upon *Robert* the son, by the deeds of 1726 and 1728, the power reserved to him of charging the estate with 300 *l.* was restrained to his daughters only, and upon the event too of his having no male issue, thereby excluding all his younger children if he had a son, when the father was empowered at all events to charge it with 800 *l.* for his younger children absolutely. But whatever might be the sense of a Court of Equity, as to enforcing the execution

of such an agreement, in a question arising among the family themselves; it clearly could not interpose against the respondent, who had both law and equity on his side; but must leave the appellant to sue at law for his right, if he had any. If however the respondent's title under his purchase from *Robert* the son could admit of a doubt, the appellant had, by repeated solemn acts of his own, effectually removed it. By his deed of *November* 1757, he for 100*l.* confirmed the respondent's title, and conveyed to him all his right and interest in the lands. In *Michaelmas* Term 1757, he levied a fine for the like purpose; and in *Hilary* Term following, more than two months after, he suffered a recovery, for rendering the respondent's title more perfect. All these acts were done freely and of his own accord, without even a pretence of the least artifice or seduction used by the respondent to induce him thereto, and done at a time when he was fully apprised of his supposed right to the lands in question; and therefore afforded good ground for the Court's dismissing the bill with costs.

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Accordingly, after hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

DECREE affirmed.
M. S. Jour.
sub anno 1774.
P. 335.

John Bartlett Allen, Esq; and *Elizabeth* } Appellants. Case 25.
his Wife, and seven of their Children,

Frances Hancorn, Widow, and her three } Respondents.
surviving Children, - - -

31st March 1775.

THIS suit was originally commenced by *Thomas Hancorn*, and the respondent *Frances Hancorn* then his wife, and by their children, against *John Hensleigh* since deceased, and the appellant *Elizabeth Allen* his daughter, and the several other appellants parties thereto; and the single question in the cause was, whether the respondents, who were the *cestuique* trusts under a marriage settlement, or the trustees named in such settlement, should bear the loss of the trust fund?

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On the 10th of *August* 1739, the respondent *Frances Hancorn*, who was then the widow of *Rowland Owen*, Esq; entered into articles of agreement with *Thomas Owen*, Esq; the brother and heir of the said *Rowland Owen*; whereby *Frances*, in consideration of 1552*l.* 17*s.* 5*d.* to be paid her by *Thomas Owen*, agreed to sell and release to him, all her right as well to a certain annuity of 150*l.* which she was entitled to under her former marriage settlement, as all her right to the real and personal estate of the said *Rowland Owen*, her husband.

The respondent *Frances* being thus entitled to the said sum of 1552*l.* 17*s.* 5*d.* and a marriage being intended between her and *Thomas Hancorn*, it was, by articles dated the 15th of *December* 1739, agreed, that if the marriage took effect, then 1500*l.* part of the 1552*l.* 17*s.* 5*d.* should be laid out in the purchase of lands, to be settled to the use of *Thomas Hancorn* and *Frances* his intended wife, and the survivor of them, for their lives, with remainder to the issue of the marriage as therein mentioned; and that the residue of the 1552*l.* 17*s.* 5*d.* with the accruing interest, should be paid to *Thomas Hancorn* for his own use.

On the 29th of the same month, the marriage was solemnized, and soon afterwards *Thomas Hancorn* and his wife were advised by her uncle *Thomas Phillips*, and others of her relations, to assign the said sum of 1552*l.* 17*s.* 5*d.* to *Phillips*, for the uses and purposes mentioned and declared by the said articles, and which they consented to do. And accordingly, by indenture dated the 30th of *May* 1740, between *Thomas Hancorn* and *Frances* his wife, of the one part, and the Reverend *Thomas Phillips*, Clerk, of the other part; reciting, that by the above agreement of the 10th of *August* 1739, the said *Frances Hancorn* was entitled to the sum of 1552*l.* 17*s.* 5*d.* and some interest; it was witnessed, that as well in consideration of the marriage between the said *Thomas Hancorn* and *Frances* his wife, as in pursuance and performance of the said marriage articles, and for securing a provision and maintenance for the said *Frances*, in case she should survive the said *Thomas*, and for making a provision for the heirs of their bodies the said *Thomas Hancorn* did grant, bargain, sell, assign and convey over, unto the said *Thomas Phillips*, his executors, administrators and assigns, the said 1552*l.* 17*s.* 5*d.* and all interest due, and to become

become due, for the same; to hold to him, his executors, administrators and assigns, in trust, that the said *Thomas Phillips* should receive the said 1552*l.* 17*s.* 6*d.* and the interest thereof, of and from the said *Thomas Owen*, and that with all convenient speed after receiving the same, the said *Thomas Phillips*, his executors, administrators and assigns should, by and with the joint consent and approbation of the said *Thomas Hancorn* and *Frances* his wife, during their joint lives, and of the survivor of them, after the decease of either of them, and of the heirs of their two bodies, after the decease of such survivor, lay out and invest 1500*l.* part thereof in the purchase of lands, in the county, or county borough of *Carmarthen*, or in the county of *Glamorgan*, and which, when so purchased, should be conveyed to the said *Thomas Phillips* and his heirs, or some other person or persons, and his or their heirs, to the use of the said *Thomas Hancorn*, and *Frances* his wife, and the survivor of them for life, without impeachment of waste, and after the decease of the survivor of them, to the use of some person or persons, and his or their executors, administrators and assigns for 500 years, for raising 300*l.* for the portion or portions of such younger child or children as should be begotten by the said *Thomas Hancorn*, on the body of the said *Frances* his wife, and to be paid entirely to such younger child, if but one, and if more than one, then to be divided among such younger children, equally share and share alike, immediately after the decease of the survivor of them, the said *Thomas Hancorn*, and *Frances* his wife; and after the determination of the said term, and in the mean time subject thereto, to the use of the first and other sons of the said *Thomas Hancorn*, on the body of the said *Frances* his wife begotten, or to be begotten, successively in tail male; and for want of such issue, to the use of the daughter or daughters of the said *Thomas* and *Frances Hancorn*, and the heirs of the bodies of such daughters, as tenants in common, and not as joint tenants; with remainder to the use of the right heirs of the survivor of the said *Thomas* and *Frances Hancorn* for ever: And on further trust, that in the mean time, and until such purchase, the said *Thomas Phillips* his executors, administrators and assigns, should by and with such consent and approbation as aforesaid, lay out the said 1500*l.* at interest, and annually pay the interest arising therefrom, to and for the use and benefit of such person and persons, as according to the intent and meaning of the said indenture,

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indenture, should or ought to receive the rents and profits of such lands if purchased; and in default of such purchase, the said 1500*l.* should be and remain to the same uses, intents and purposes as the said lands ought to be and remain, in case the same were purchased and settled to such uses as aforesaid; and as to the residue of the said 1552*l.* 17*s.* 5*d.* and all interest thereof, in trust, to pay the same to the said *Thomas Hancorn*.

By indenture of six parts, dated the 6th of *September* 1740, between the said *Thomas Hancorn* and *Frances* his wife, of the first part, the said *Thomas Phillips* of the second part, *James Phillips*, clerk, of the third part, *Roger Mostyn* and *Hugh Owen* Esqrs; of the fourth part, *Richard Owen* and *Ann* his wife, of the fifth part, and the said *Thomas Owen*, the brother and heir of the said *Rowland Owen* deceased, of the sixth part; reciting, among other things, the agreement of the 10th of *August* 1739, and the marriage settlement of the 30th of *May* 1740, it was witnessed, that in consideration of 1500*l.* paid to *Thomas Phillips*, and 126*l.* 13*s.* 10*d.* (part being accruing interest) paid to *Thomas* and *Frances Hancorn*, the said *Thomas Phillips*, *Thomas Hancorn* and *Frances* his wife, did bargain, sell, release, assure and quit claim, unto the said *Thomas Owen* and his heirs, as well the said annuity of 150*l.* *per ann.* as all their right to the real and personal estate of the said *Rowland Owen* deceased; to hold to the said *Thomas Owen*, his heirs and assigns for ever.

Thomas Phillips, at the time he executed this indenture, actually received the sum of 1500*l.* and signed a receipt for the same, upon the back of the deed.

Thomas Hancorn and his wife being entitled to the interest of this 1500*l.* during their joint lives, under the settlement of the 30th of *May* 1740, the respondent *Frances* did, in 1741, apply to *Thomas Phillips*, the trustee, for the interest thereof, who directed his brother *John Phillips*, who was his banker, to pay such interest; and accordingly the same was so paid by him, as it became due, to the respondent *Frances*, until the 12th of *April* 1744; when *Thomas Hancorn* requested the said *Thomas Phillips* the trustee, to advance him 145*l.* part of the trust money; which sum *Thomas Hancorn* had lent to *William Bennet*, on a mortgage of lands, and *Thomas Phillips* accordingly paid that sum

sum to *Thomas Hancorn*, and the security taken by him of the said *William Bennet* for the same, was placed in the hands of *Thomas Phillips*, on account of the said trust, which reduced the trust money in the hands of *Thomas Phillips* to 1355*l.* and from that time he permitted *Thomas Hancorn* to receive the interest of the mortgage, and the interest of the residue of the trust money was paid to the respondent *Frances*, until near the time of the death of *Thomas Phillips*, which happened on the 23d of June 1748.

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The said *Thomas Phillips*, by his will, dated the 14th of January 1747, in the first place, subjected his real and personal estate to the payment of his debts, and after discharging his debts, legacies and funeral expences, he willed, that his personal estate should be sold, and the produce thereof laid out at interest, or in a purchase, in order that it might be annexed to and attend his real estate; which he thereby devised to his brother *John Phillips*, and his son-in-law *John Hensleigh*, in trust, and for the use and benefit of his granddaughter *Elizabeth Hensleigh*, (the appellant *Elizabeth Allen*) for her life; with remainder to her first and other sons, successively in tail; with remainder to her daughters, as tenants in common; and in default of such issue, to *Vaughan Phillips* for life, with other remainders over; and of his said will appointed his brother, the said *John Phillips*, and his said son-in-law *John Hensleigh*, executors, in trust for his said granddaughter.

Upon the death of *Thomas Phillips*, *John Phillips* and *John Hensleigh* proved his will, and thereby obtained possession of the deed of settlement of the 30th of May 1740, and the security whereon the 145*l.* had been placed out; and they or one of them paid interest for the residue of the trust money, being 1355*l.* until the month of June 1751; when *Thomas Hancorn* represented to them, that he had purchased the equity of redemption of the premises on which the said 145*l.* was secured, for the sum of 161*l.* 14*s.* and requested them to pay that sum, and that the said premises should remain to the several uses mentioned in the settlement of the 30th of May 1740, which request the said *John Phillips* and *John Hensleigh* complied with; and accordingly, in June 1751, *Thomas Hancorn* received of *John Phillips*

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Phillips, by the order in writing of the said *John Hensleigh*, the sum of 161*l.* 14*s.* and the conveyance of the said premises purchased therewith, was deposited in the hands of the said *John Hensleigh*, for the uses mentioned in the settlement.

After making this purchase, there remained of the trust money, 1193*l.* 6*s.* the interest whereof was paid to *Frances Hancorn*, down to the 11th of *August* 1757.

On the 18th of *May* 1758, *John Phillips* died, whereby the trusts which remained unexecuted, became vested in *John Hensleigh*; in consequence whereof, *Thomas Hancorn* and his wife afterwards applied to *Hensleigh*, for the interest of the 1193*l.* 6*s.* the residue of the trust money remaining uninvested, but he declined paying such interest; pretending, that the trust money was placed by his testator *Thomas Phillips* in the hands of *John Phillips*, and that *John Phillips* having died insolvent, the said sum of 1193*l.* 6*s.* was lost; and there being infants concerned, he could not pay the said sum, or the interest thereof, without the directions of a court of equity.

Whereupon, in *Michaelmas* Term 1760, *Thomas Hancorn*, his wife, and their children, then infants, exhibited their bill in the Court of Chancery, against the said *John Hensleigh*, as the surviving executor of *Thomas Phillips*, and also against the other appellants, praying, that the defendants *John Hensleigh* and *Elizabeth Hensleigh* might either admit assets of *Thomas Phillips*, or account for his estate and effects, and that an account might be taken of the said sum of 1193*l.* 6*s.* being the residue of the trust money and of the interest remaining due thereon, and that such interest might be paid to the then plaintiff, *Thomas Hancorn*, for his own use: And also, that the said principal sum of 1193*l.* 6*s.* might be raised and paid in such manner as the Court should direct, in order that the same might be laid out and invested in the purchase of lands of inheritance, to be conveyed and settled upon the trusts, and for the uses in the said indenture of the 30th of *May* 1740 mentioned, so that the plaintiffs might have the benefit thereof, according to their respective rights and interest therein, under the said indenture.

The defendants *John Hensleigh* and *Elizabeth Hensleigh* put in a joint answer to this bill, and *John Hensleigh* thereby admitted the

the most material of the several facts stated in the bill, and particularly, that he had possessed assets of his testator *Thomas Phillips*, more than sufficient to satisfy his just debts and funeral expences, and whatever demands the plaintiffs might justly have upon his estate; and he also admitted, that several applications were made by *Thomas Hancorn* to *Thomas Phillips* in his lifetime, to lay out the trust money in purchases; and he likewise admitted his having given an order in writing to *John Phillips*, his co-executor, to advance 161*l.* 14*s.* part of the trust money, for the purpose of purchasing the equity of redemption of the said mortgaged premises; and that the deeds of such purchase, together with the settlement of the 30th of *May* 1740, were in his custody. But he insisted, that if the estate of *John Phillips* should not be sufficient to pay the 1193*l.* 6*s.* the residue of the trust money, and the interest thereof from *August* 1757, no part of the estate of *Thomas Phillips* the trustee, was liable to make good any such deficiency; because *Thomas Hancorn* and his wife were privy, and consenting to *Thomas Phillips*'s placing the whole 1500*l.* in the hands of *John Phillips*, and knew what security was given for the same, and approved thereof; and that the loss which had happened, did not arise from any wilful default or neglect of *Thomas Phillips*, but rather through the default of *Hancorn* and his wife, in not objecting to *John Phillips*'s security, and procuring some other security or mortgage for the trust money.

The cause being at issue, divers witnesses were examined on both sides. And the substance of the evidence adduced on the part of the respondents, was the due execution of the several deeds before stated, and the signing of the receipt by *Thomas Phillips* for the 1500*l.* trust money; a treaty between *Thomas Hancorn* with one *Powell*, in the year 1747, for the purchase of several estates in the county of *Glamorgan*; his informing *John Phillips* of such treaty, and *Phillips*'s answer in writing, that his brother *Thomas*, and not himself, was accountable for Mrs. *Hancorn*'s fortune; and a remarkable conversation between Mr. *Hensleigh* and one *Joseph Chapman*, in *November* 1768, wherein *Hensleigh* acknowledged, that he thought Mrs. *Hancorn* ought not to lose her money, as it was her just due; that he had no objection to her being paid, but could not do it, as there were infants in the case, without the direction of a Court of Equity; and that he would

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would not oppose her being paid, but, on the contrary, would do all in his power to procure a decree for that purpose, as he was satisfied with the justness of her demand. The appellant's evidence proved an accountable receipt from *John Phillips* to his brother *Thomas*, for 1500 *l.* dated the 11th of *September* 1740; the goodness of his circumstances at that time, and for several years afterwards; and divers receipts for the interest of the trust money, and for such part of the principal as was really invested.

Upon this evidence, the cause came on to be heard before the Lord Chancellor *Bathurst*, on the 2d of *May* 1774, when his Lordship was pleased to decree, that it should be referred to the Master, to take an account of what was due for principal and interest, in respect of the sum of 1193 *l.* 6 *s.* the remainder of the trust money in question, such interest to be computed from the death of the late plaintiff *Thomas Hancorn*, after the rate of 4 *l.* per cent. per annum; and it being admitted, that *John Phillips*, in whose hands the same was lodged by *Thomas Phillips*, the trustee thereof, was dead insolvent, his Lordship declared, that the same was to be considered as a debt due from the estate of the said *Thomas Phillips*, and the defendants *John Bartlett Allen* and *Elizabeth* his wife, the administratrix of the defendant *John Henfleigh*, who was the surviving executor of the said *Thomas Phillips*, admitting assets of *Thomas Phillips*, it was ordered, that the said defendants *John Bartlett Allen* and *Elizabeth* his wife, should pay what should be found due for the interest of the said 1193 *l.* 6 *s.* to the plaintiff *Frances Hancorn*, widow, and that they should also pay the said principal sum of 1193 *l.* 6 *s.* into the Bank, in the name and with the privity of the Accountant General, to be placed to the credit of the cause, and that the same, when so paid in, should be laid out in the purchase of Bank 3 *l.* per cent. annuities, in the name and with the privity of the Accountant General, in trust in the cause, upon the trusts in the indenture of the 30th of *May* 1740, and he was to declare the trusts thereof accordingly, subject to the further order of the Court; and it was ordered, that the interest to accrue on the said Bank annuities, should be paid from time to time to the said plaintiff *Frances Hancorn*, widow, during her life, or until further order; and upon her death, any of the parties, or other persons entitled to the capital of the said Bank annuities, were to be at liberty to apply to the Court concerning the same. And it

it was further ordered, that the plaintiff should pay the defendant *Vaughan Phillips* his costs of the suit, to be taxed by the Master; and that the plaintiffs should be paid such costs over again, together with their own costs of suit, to be taxed by the Master, by the defendants *John Bartlett Allen* and *Elizabeth* his wife, they admitting affets as aforesaid.

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From this decree the appellants appealed, insisting, that the remaining principal and interest of the trust monies in question, ought not to be considered as a debt due from the estate of *Thomas Phillips*, nor ought the appellants *Allen* and his wife to pay the same, or the costs of the several parties in the cause, as by the decree was directed; because a trustee is only answerable for fraud, or a gross neglect, which is equal to fraud. That no fraud was imputable to *Thomas Phillips*, in placing the trust monies in the hands of his brother *John*. The terms and intention of the trust created by the deed of *May 1740*, did not require the trustee to lay out the money in the funds, or on real security, but only directed it to be placed out at interest, with the consent of the husband and wife; the trustee might therefore take such personal security as they approved, and as there was no reason to suspect, without any imputation of neglect. That the trust monies in question were, at the time of *Thomas Phillips*'s death, safe in the hands of *John Phillips*, who, as one of the executors of *Thomas*, became himself the trustee, and responsible for the money. Any loss therefore which arose from subsequent events, ought not to be made good out of *Thomas*'s estate, but must be answered by his executors, in so far as any misconduct could be imputed to them, or either of them. That *John Hensleigh*, the other executor of *Thomas Phillips*, not having received any part of the trust money, nor misbehaved in the trust, he was not answerable, neither had the decree charged him; but if he was liable from personal misconduct, it would afford no reason to charge the estate of his testator. But the loss in the present case, was really to be imputed to the confidence not unreasonably placed in *John Phillips*, by Mr. and Mrs. *Hancorn*, his daughter and son-in-law; the direction of this trust was expressly reserved to them; without their consent no estate could be purchased, nor any security changed; if there had been any neglect, it was owing to their continuing that credit too long; and it would be a very dangerous precedent to charge the estate

E. Thurlow.
A. Wedderburn.
T. Nedham.

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of a trustee with a loss arising long after his death, from the neglect of the *cestui que* trusts.

R. Perryn.
J. Madocks.
J. Brown.

On the other side it was said to be clear, that *Thomas Phillips* received the 1500*l.* upon the trusts of the settlement of May 1740, to be laid out in the purchase of lands, and in the mean time to place it out at interest, with the joint consent of the husband and wife. How he applied or disposed of it, did not clearly appear; for though it was alledged by the appellants, that he paid it to his banker *John Phillips*, upon the accountable receipt mentioned in the pleadings, yet there was nothing upon the face of that receipt to induce a belief, and much less to prove, that it was the trust money; nor was there a tittle of evidence in the cause to shew, that either the husband or wife was previously informed of, or consented to such payment. And therefore the appellants were reduced to the necessity of inferring that consent, from the subsequent transactions of the husband and wife with *John Phillips*. But supposing they had consented, and even requested *Thomas Phillips* the trustee, to have placed this money in the hands of *John Phillips*, it was submitted, that he would not thereby have been justified in so doing; for he was not a trustee for the husband and wife only, but for their issue then unborn; it was therefore his duty to have taken care of the interest of such issue, and he ought not to have lent the money upon any such precarious security. In point of fact however, it was clear, that the husband never consented to, or approved of the money remaining in the hands of *John Phillips*; but endeavoured to get the same out, by treating with several persons for the purchase of estates to invest it in. That if the 1500*l.* paid to *John Phillips* was really the trust money, yet the trustee had not pursued the terms of the trust, nor taken a reasonable security. An accountable receipt only was taken, without specifying any interest, or promising any farther security. The person giving this receipt, was the father of the wife, brother of the trustee, and a remitter of money. In the two first characters he was improper, as having much influence over the parties; and in the third character he was improper, as being liable to frequent and considerable losses in the course of his business.

But it is contended by the appellants, that the breach of trust, if any, was in the executors of *Thomas Phillips* after his death, and

and not in him; and that therefore the estate of *Thomas Phillips* is not liable to make good any loss which should arise by the default of his executors. It is however plain, that in this case *Thomas Phillips* was guilty of a wilful and inexcusable neglect and breach of trust; for supposing the 1500*l.* paid to *John Phillips* was the trust money, the trustee, after advancing it on an accountable receipt only, suffered it to remain in *John's* hands for many years, without requiring any further security of him; without endeavouring to place it out on mortgage; without making any enquiry after proper purchases. And when the *Cestui que* trust was in treaty for estates to invest the trust money in, the trustee referred the propriety of such purchases to the very person who had the money in his hands, and whose interest it was to prevent such purchases from being compleated, and who in fact always disapproved thereof.

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After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the respondents bill should be dismissed, without costs.

DECREE reversed.
M. S. Jour.
sub. anno 1775.
p. 500.

George, Duke of Montagu, and others, Appellants. Case 26.
Edward, Lord Beaulieu, and others, Respondents.

Et à Contra.

6th April 1775.

THE material facts of this case have been already stated, on occasion of a former appeal *; and in consequence of the order then made †, several proceedings were had before the Master, who, on the 16th of June 1773, made his report, in which he stated the several accounts which he had taken of the personal estate, and of the rents and profits of the real estate of *Ralph Duke of Montagu*; the general result of which account was, that the personal estate of *Duke Ralph* (including two sums of 2102*l.* 2*s.* 8*d.* and 20,097*l.* 16*s.* received in consequence of the articles of 1724) amounted to 52,199*l.* 2*s.* 8*d.* and that the payments

* Vol. VI.
p. 232.
† Ibid. p. 253.

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payments and allowances thereout allowed to Duke *John*, in respect of his father's debts, legacies and funeral expences, amounted to 48,412 *l.* 8 *s.* 1 *d.* which left a balance in favour of the personal estate, of 3786 *l.* 14 *s.* 6 *d.* but that a balance was due to Duke *John*, on account of the real estate, of 1695 *l.* 14 *s.* 2 *d.* which being deducted, the final balance due from him appeared to be 2091 *l.* 0 *s.* 43 *d.*

Exceptions were taken on both sides to this report, the most material of which were, the 4th, 5th, 6th, 7th, 8th, and 9th exceptions of the respondents.

These exceptions were couched in the following words; viz. IV. "For that the said Master had by his said report, "charged the representatives of *John* Duke of *Montagu*, with "no more than the sum of 20,097 *l.* 16 *s.* part of the sum "of 32,753 *l.* 13 *s.* 10 *d.* due to Duke *Ralph* from *Christopher* "Monk, or his representatives: Whereas the respondents charged "and proved, that on the 24th of *June* 1724, there was due "from the said *Christopher* Monk, and his representatives, to "the estate of Duke *Ralph*, the sum of 32,753 *l.* 13 *s.* 10 *d.* "over and besides the sum of 2102 *l.* 2 *s.* 8 *d.* mentioned in the "6th exception; and therefore they insist, that the Master "ought to have charged the representatives of Duke *John*, "with the said whole sum of 32,753 *l.* 13 *s.* 10 *d.*—V. For "that the said Master had disallowed the charge of the respon- "dents, as to the produce of the said 32,753 *l.* 13 *s.* 10 *d.* from "the 24th of *June* 1724, and had not charged the representa- "tives of the said *John* Duke of *Montagu*, with the produce "thereof from that time, to the time of filing the exceptions. "—VI. Nor with the produce of the said sum of 2102 *l.* 2 *s.* 8 *d.* "the interest due on the *Grindon* mortgage at the death of "Duke *Ralph*, from the said 24th of *June* 1724, to the time "of filing the exceptions.—VII. For that the Master had to- "tally disallowed the charges carried in before him by the re- "spondents, as to the Exchequer annuity of 1000 *l.* a year, "and had not charged the representatives of Duke *John* with "the life estate or interest of Duke *John* therein, given to him "by the will of Duke *Ralph*, on the condition therein men- "tioned, which was not performed: Whereas the Master "ought to have charged the representatives of Duke *John*, with

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"all the quarterly payments of the said annuity from the
 "24th of *June* 1711, to the time of filing the exceptions.—
 "VIII. For that the Master had by his report, applied the whole
 "rents and profits of the devised real estates of Duke *Ralph*, to
 "the discharge of the several annuities and interest of mortgages,
 "charged on the said real estates, being part of the debts of
 "Duke *Ralph*, without making the Exchequer annuity bear a
 "proportion of such debts, which the said Master ought to have
 "done; the said Exchequer annuity being liable, although
 "it should be considered as a specific legacy given by the
 "will. IX. For that the said Master had not charged the estate
 "of Duke *John*, or his representatives, with any rents or pro-
 "fits of fourteen houses or tenements, in the parishes of St.
 "*Martin* in the Fields, and St. *Clement Danes*, part of the real
 "estate of Duke *Ralph*, (which were sold by Duke *John* on the
 "23d of *March* 1727,) subsequent to *Christmas* 1726, to the
 "present time; nor with the purchase money or value of the
 "said fourteen houses and tenements, as he ought to have done,
 "but the said Master had totally disallowed the respondents
 "charge as to those matters."

On the 21st of *January* 1774, these exceptions were argued
 before the Lord Chancellor *Bathurst*, when his Lordship order-
 ed the 4th exception to be allowed, as to a sum of 238 *l.* which
 was to be added to Duke *Ralph*'s personal estate; and that the
 rest of that exception, and the 5th, 6th, 7th and 8th exceptions
 should be over-ruled: And as to the 9th exception, it was or-
 dered, that the estate of Duke *John* should be further charged
 with the rents and profits of the said houses, from *Christmas*
 1726, till Duke *John*'s death.

From so much of this order as allowed the 9th exception,
 the original appeal was brought; and so much of it as over-
 ruled the 4th, 5th, 6th, 7th and 8th exceptions, was the sub-
 ject of the cross appeal.

In support of the original appeal, it was said, that in 1726,
 the houses in question, together with part of *Southampton Build-*
ings, of the yearly value of near 800 *l.* were sold under the au-
 thority of Parliament, and the direction of the Court of Chan-
 cery, for 20,000 *l.* which was paid to Lady *Beaulieu*'s trustees;

E. Thurlow.
 J. Dunning.

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so that no other rents were received by, or for the use of the late Duke of *Montagu*, except those which had been accounted for. The act of Parliament recited, that the agreement which was to be effectuated by that law, was beneficial to the children; *prima facie* it would be presumed, that their interests were taken care of; and that the Duke their father, as well as the Duke of *Manchester* and his friends, and the common friends of both families, did not contrive to cheat the daughters, and prevail upon Parliament to lend its assistance to compleat the fraud. But if the respondents were right, fraud was imputable not only to all these parties, but even the Court of Chancery lent its aid. For the propriety of the agreement did not rest upon the act of Parliament only, as it appeared by the facts stated in the case, that that part of the transaction which was overturned by the order now appealed from, was carried into execution under the direction of the Court of Chancery, in the cause where Lady *Beaulieu* and her husband the Duke of *Manchester* were parties. The sale was made under the authority of that Court; and the money applied for Lady *Beaulieu*'s benefit, pursuant to the articles and act of Parliament. The Duke of *Montagu* her father had not, nor could have any benefit from it, in any event whatever. The agreement entered into by the articles of 1722, confirmed by the act of Parliament and subsequent proceedings, was almost forty years before the commencement of the cause, in which the transaction was now attempted to be impeached. If it be said, that Lady *Beaulieu* was a minor at the time, and that she was afterwards under coverture, and therefore disabled from asserting her right; yet it must be remembered, that the Duke of *Manchester* died in 1739, and that then every disability ceased. She was of competent age to judge, whether it was expedient to attempt to rescind the agreement made on her marriage, and abandon what was then provided for her; and the provision which the care of her father had secured for her by that agreement, had placed her in circumstances so affluent, that she was well able to assert and defend her right.

After an agreement so made and ratified, carried into execution in all its parts, and so long acquiesced under, it seemed rather hard, that the appellants should be required to shew, that Lady *Beaulieu* was a gainer by it; but they were not afraid of enter-

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ing into that point. The portions for the ladies were not raiseable until after the death of their father, who, at the time of Lady *Beaulieu's* first marriage, was but thirty two years of age. It was not improbable, that he might live to see her arrive at an advanced time of life. In fact, he survived her first marriage twenty six years. It was of importance to the future prospects in life of the daughters, that the payment of their portions should be accelerated. It must be remembered, that at the time of the agreement, the estates comprised in Duke *John's* marriage settlement, of which *Southampton Buildings* were part, and the estates of which Duke *Ralph* died seised in fee simple in possession, of which the houses in question were part, stood settled alike; except that Duke *John's* estate for life did not extend to the latter. After his death, it was perfectly indifferent to the parties interested in remainder, whether the 40,000 *l.* portions were raised from the settled estate entirely, or whether the houses, the rents whereof formed the present matter in dispute, were applied, as far as they would extend, towards discharging that burthen; because both the estates, after his death, would belong to the same person. The Duke's estate for life stood clear of the portions; he therefore would have been no gainer, if they had been wholly raised out of the other estate; nor would the daughters have been losers, for the interest of the money would have been equivalent to the rents of what had been sold for that purpose. But the Duke was willing to make a large concession in their favour: He therefore agreed, that, together with the houses in question, which were of the yearly value of 408 *l.* subject to a rent charge of 200 *l. per ann.* for the life of the annuitant, *Southampton Buildings*, of the yearly value of 1792 *l.* to which he was entitled for life, should be sold for raising the portions. So that for 26 years, and it was not improbable that it might have been for a much longer period, he gave up 1792 *l. per ann.* for the benefit of his daughters. The moiety which Lady *Beaulieu* was entitled to receive of the 408 *l. per ann.* after keeping down the rent charge thereon, would only have amounted to a very small annual sum; instead of which, she had, in consequence of this agreement, 600 *l. per ann.* immediately secured to her separate use out of the 20,000 *l.* raised for her portion; subject to which, it was settled for the benefit of her children, and the Duke of *Manchester* her husband; who,
in

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in consideration of it, settled upon her a jointure of 2000*l.* per ann. for her life, and his estates on the issue of the marriage; and upon the death of her father, she found the estate, which would then have become liable to the portions, discharged of that incumbrance. The Duke her father, was in no respect affected by the mode of raising the portions, but by giving up to his daughters a life estate of 1792*l.* a year for that purpose, which, in the time he out lived the agreement, would have amounted to near 40,000*l.*

Yet it is said, that the Duke of *Montagu* procured advantages to himself by this agreement; viz. a re-settlement of the family estate, whereby his daughters were reduced from tenants in tail, to tenants for life, with limitations to their issue in tail, and an ultimate reversion in fee to himself; and that he also procured the inheritance of the advowson of the parish church of *St. Andrew, Holborn.*

As to the re-settlement, it must be observed, that it left untouched the estate for life of Duke *John*, and the limitations in tail to his issue male; and only settled such parts and shares as these two daughters might respectively become entitled to, upon or after the death of the Duke their father, and failure of issue male of his body; that the Duke was then but 32 years of age, and might probably have issue male, and in fact had another son in 1725, who lived about two years. It was therefore upon an event barely probable, that the re-settlement was to take place. It is usual in great families, for re-settlements to be made upon the marriage of an eldest son, or other child, entitled to an estate tail, and for such child to reduce himself, or herself, to an estate for life. It was done upon the marriage of Duke *John*, who was then but 14 years of age, and the reversion in fee was given to Duke *Ralph*, subject to no other limitations than to Duke *John* and his sons; out of which reversion, the interests of the daughters arose under Duke *Ralph's* will. By the re-settlement, the interests of the daughters were well taken care of, and their issue were placed in a safer condition; the subsequent limitations were to relations of the name and blood of this noble family, who were also remainder-men under Duke *Ralph's* will, and therefore necessarily considered in the re-settlement; as Parliament would not, probably,

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ably, have otherwise lent its assistance to raise the 40,000*l.* And as to the reversion in fee, which the Duke was supposed to have got by the re-settlement, it must be observed, that at the time of the treaty, he had the reversion of these estates, subject to the limitations of Duke *Ralph's* will; and the ultimate remainder limited by the re-settlement was placed at such a distance, as not to have been at all more valuable than the former reversion. These observations supposed, that the reversion in fee was really limited to Duke *John* by the articles of 1722; but that was not so. For although these articles contained a limitation *to the right heirs of the said John Duke of Montagu for ever*, yet nothing was clearer, than that he took no interest by those words; for the articles contained no prior limitation to him for life, or otherwise; no interest of his could be enlarged by these words; but the party or parties who should eventually turn out to be his heir, or coheirs, would, under that limitation, take the ultimate remainder in fee *by purchase*; and consequently, if the re-settlement should take place at all, that ultimate remainder must vest in, or come to the ladies themselves; for if the Duke should leave a son, who should live to make a disposition of these estates, the re-settlement would never take place. It did in fact vest in the ladies by purchase; Duke *John* therefore, instead of acquiring a more valuable reversion, gave up that to his daughters, which before the treaty he was entitled to. The ultimate remainder was, in truth, too remote to be of much consideration. Both the ladies had issue, who had attained 21, recoveries had been suffered, and there was an end of all the limitations.

As to the advowson of St. *Andrew's*, the Duke was, at the time of the treaty, tenant for life of it, under his own marriage settlement, prior to which he had been tenant in tail; and the interest he acquired in it by the articles, could scarcely amount to more than one tenth part of what he gave up to his daughters by the treaty, in lieu of it. And yet this interest in the advowson was all he got by the articles, in whatever view the transaction was considered. His life interest in the family estate was diminished no less than 1792*l.* a year; what remained was eased of no burthen; nor, by the whole of the bargain, was any other possible advantage to accrue to him. But lastly, if the agreement was at this distance of time to be rescinded, it must, according to the rules of equity, be rescinded *in toto*; and

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both parties put into the situation in which they would have stood, if the agreement had not been made. If the respondents wished for that, it was not the interest of the appellants to object to it; for as the Duke's estate would, on the one hand, be charged with the value of Lady *Beaulieu's* moiety of the interest he acquired in the advowson, and with a moiety of the rents in question; it must, on the other, be allowed the interest of the 20,000 *l.* raised for her Ladyship in pursuance of the agreement, which would make an increase of many thousand pounds in his assets.

A. Wedderburn.
A. Forrester.

On the other side it was said, that the order made on this ninth exception, was founded on the judgment of the House in 1767; whereby their Lordships were pleased to declare, "That *John* late Duke of *Montagu* was not entitled to the benefit of any bequest or devise by the will of his father, from three months after he had suffered the recovery; the said *John* Duke of *Montagu* never having complied with the condition annexed thereto, by settling his *Warwickshire* estate; and that the same ought to go in such manner, and to such persons, as is limited and directed by the proviso in the will." On the 18th of *April* 1711, Duke *John* suffered the recovery; consequently, at the end of the three months after, his son, the Marquis of *Monthermer*, by virtue of the conditional limitation in his grandfather's will, became seised for life, without entry or claim, of Duke *Ralph's* fee simple estates; which on Lord *Monthermer's* death, upon the 6th of *August* in the same year, vested in Lady *Beaulieu* as the only child of Duke *John* then living, and the person entitled next in remainder under Duke *Ralph's* will. Duke *John* therefore, from three months after the 18th of *April* 1711, could have no right or title whatsoever to his father's fee simple estates; and consequently, though he obtained (upon such pretences as the respondents wished not to repeat) acts of Parliament for the sale of them; it was but common justice, that he, or his representatives, should not only account for the rents and profits of such of the estates as he actually sold, but also for the real value of them.

But it is objected, that the devised *Middlesex* estates were sold towards raising 20,000 *l.* for Lady *Beaulieu*, on her first marriage with the Duke of *Manchester*; which portion being charged on

estate

estates settled upon Duke *John* for life, he was not obliged to raise in his lifetime, and as together with the devised estates, he sold part of his settled estates, which produced a larger income than the former, to make up the 20,000 *l.* portion; therefore under the *just allowances* directed by their Lordships order to be made by the Master, Duke *John's* representatives ought not to be charged with the rents and profits of the devised estates, subsequent to the time of sale, they being inferior to those of the settled estates which were sold.

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In answer to this, it was said, that the consideration of a supposed comparative advantage to the daughter, by raising her portion in her father's lifetime, could not be entered into under the head of *just allowances*. It was plain, that Duke *John* himself never intended to claim any such allowance; for he kept no separate or distinct accounts of the price or value of the devised *Middlesex* estates. He sold them, along with part of the settled estates, to one purchaser for 20,000 *l.* But if any peculiar merit could be ascribed to a father, for providing for a child in his own lifetime, Duke *John's* bounty in this respect was fully compensated, by not only reducing the estate tail which Lady *Beaulieu* was entitled to under her grandfather's will, to a bare estate for life; but also by depriving her of one moiety of the advowson of the church of St. *Andrew, Holborn*, worth above 1000 *l.* a year, which, by the very same instrument, he procured to be limited to himself in fee, and which he afterwards devised to the Dutchess of *Montagu* and her issue.

In support of the cross appeal, as to the 4th, 5th, and 6th exceptions, it was said to have been admitted before the Master, that on the 24th of *June* 1724, there was due from *Monk's* estate, to the estate of Duke *Ralph*, no less a sum than 32,753 *l.* 13 *s.* 10 *d.* besides the *Grindon* mortgage. And Duke *John*, as executor of his father, having of his own accord, compounded and released these debts, and having kept no sort of account of what he recovered out of *Monk's* real or personal assets, became answerable for the whole; out of which therefore the Master was not warranted to make any deduction. That as Duke *John*, by the articles of 1724, accepted lands in lieu of all the demands, which, as executor of his father, he had on *Monk's* estate, he consequently was as much accountable for the rents and profits

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profits of those lands, or for the interest of the money with which they were purchased, as he was for the rents and profits of any other of Duke *Ralph's* devised estates.

And, as to the 7th and 8th exceptions, it was said, that neither the specific bequest of the Exchequer annuity by Duke *Ralph*, nor the dismissal of Lord and Lady *Beaulieu's* claim of a moiety of it, could warrant the Master's total omission thereof in his account of Duke *Ralph's* personal estate, come to the hands of Duke *John*. It was clearly part of Duke *Ralph's* personal estate, and therefore applicable, in case of a deficiency of other assets, to the payment of his debts; and though it was specifically devised, so were the real estates, which yet were, by the Master, made to bear the whole burthen of the debts, without any contribution from this annuity. The former dismissal of Lord and Lady *Beaulieu's* claim to a moiety of it, must have been grounded on Duke *John's* taking it, not under his father's will, but as representative of his son *George*, in whom it was admitted, in consequence of their Lordship's judgment, the absolute property vested. But if there was any period during which Duke *John* held, and could hold the annuity, or what he sold it for, only under his father's will, it ought, in pursuance of their Lordship's order, to go in such manner, and to such person, as was directed by the proviso in Duke *Ralph's* will; and that there was such a period was evident. For John Lord *Montagu*, the devisee thereof for life, died on the 6th of *August* 1711, from which time to the birth of *George*, on the 11th of *October* 1715, there being no intermediate taker but Duke *John*, he could only take it under the limitation of his father's will; so that here was a term of four years and a quarter, from the 24th of *June* 1711, the quarter day next preceding John Lord *Montagu's* death, to the 29th of *September* 1715, the quarter day next preceding *George's* birth, during which time, Duke *John* could receive the annuity merely and only as his father's devisee; and therefore he became accountable for its produce. But Lord and Lady *Beaulieu* did not confine their claim to this period; for there being, on the death of John Lord *Montague*, no other son of Duke *John's* then in being, the Duke, by the express words of his father's will, became entitled to the annuity for so many years as he should live. It ought therefore, in pursuance of their Lordships former order, to go in three months after the recovery was suffered, in such man-

ner during Duke *John's* life, as was directed by his father's will.

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Against these arguments in support of the cross appeal, it was urged on behalf of the appellants in the original appeal, that as to the 4th exception, the debts due to Duke *Ralph* from *Christopher Monk*, were contracted principally before, and partly in the year 1701, and the whole principal monies did not much exceed 12000 *l.* *Monk* died in that year, manifestly insolvent. All that he left to descend to his daughter, was the reversion of the *Albemarle* estate, under the will of the Duke of *Albemarle*, subject to the estate for life of the Dutchess, and to several remainders in tail then vested. The will itself had been contested, and *Christopher's* interest had become intangled by his articles with Lord *Bath*, and several suits were depending between them. He left other considerable debts; one of which being a judgment for 12000 *l.* was prior to Duke *Ralph's*. Duke *Ralph* survived him near eight years, without recovering any part of either principal or interest. Duke *John*, when he came of age, stood clear of the *Monks*; and when he afterwards became a creditor, it could be only with a view to facilitate the recovery of his father's demands. But these demands were irrecoverable, by any ordinary course of proceeding; the only resort was to attempt the procuring a performance between the surviving *Monks*, and the representatives of Lord *Bath*, of the articles of 1697, entered into between *Christopher* and his Lordship; and in that negotiation, to obtain some satisfaction, out of what might be derived to the *Monks* from thence. This measure was advised by counsel, in the year 1715, and the difficulties attending it, considering the then situation of these affairs, appeared from the cases, and need not be repeated. It would have been unreasonable and impossible to be accomplished, without a proper recompence, or consideration to the surviving *Monks*, whose concurrence was necessary to compleat it. The different parties were not brought into the agreement, till the year 1724; and it manifestly appeared by the articles of 1724, from the marginal notes and observations of the counsel in the original draft, and indeed from the whole scope and nature of the agreement, that the *Monks* joining in conveying the estates, and releasing Lord *Bath's* representatives from all their claims, were the grounds and consideration of Lord *Bath's* representatives coming into the agreement.

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ment. The sums and annuities paid by Duke *John* to the *Monks*, as the consideration of their doing these acts, were necessarily paid, and extremely reasonable; for by thus inducing them to come in, he obtained not only the 30,000*l.* which had produced the present appeal, and the *Grindon* mortgage money, which had been settled by his father, but also a collateral security for the title of the *Lancashire* and *Yorkshire* estates, which had been likewise settled by his father. That out of this 30,000*l.* so recovered, he should in the first place be allowed what he paid to obtain it; and that out of the residue he should receive, in respect of his own demands upon the *Monks*, a rateable proportion with those of his father, seemed so just and reasonable as to make all argument unnecessary; for if this agreement had not been made and carried into execution, it was impossible to say that any part of Duke *Ralph's* demands, brought into question by this exception, could ever have been recovered; and yet by this agreement, Lord and Lady *Beaulieu* had, according to the report and order from which they had appealed, obtained upwards of 20,000*l.* towards satisfaction of those demands; which sum exceeded not only the principal monies, but the amount of the useless judgments which had been given as a security; whilst another judgment creditor, of a prior date, thought fit to accept of one twelfth part of his demand.—Should it however be said, that Duke *Ralph's* judgments were a higher security than Duke *John* was possessed of for his own demands, and therefore ought to have been preferred in the apportionment; it might be answered, that the priority of securities can have no weight in the application of a sum, which could never have been obtained by putting such securities into execution. Duke *Ralph's* judgments could never have been executed. Besides, the sum allowed in respect of his demands, exceeded the amount of his judgments, and it must be remembered, that part of Duke *John's* demands was a judgment for 3000*l.* which bore about the same proportion to the amount of his demands, as Duke *Ralph's* judgments did to his.

As to the 5th and 6th exceptions, it was said, that this was the first instance of an attempt before a Master, under a general direction for taking an executor's account, to charge an executor with interest upon sums which he may have received on account of his testator, which are applicable in a course of administration.

And

And it happened in the present case, that at the time when the two sums of 20,097 *l.* and 2102 *l.* 2 *s.* 8 *d.* with which Duke *John* was charged in respect of his father's demands upon the *Monks*, were got in, he was a very large creditor upon his executorship account, having paid a great many thousand pounds for his father's debts, beyond what the personal estate before that time amounted to, as appeared from the report; for, after charging him with those two sums, the final balance reported due upon the whole account, was but 2091 *l.* 0 *s.* 3 *d.* But had it been otherwise, it was not competent to the Master to consider any question of interest upon these sums; their Lordships, by their former judgment, having specially reserved the consideration of interest upon any sums received by Duke *John*, until after the Master should have made his report.

As to the 7th exception, which related to the Exchequer annuity, their Lordships had already in this cause decided, that Lord and Lady *Beaulieu* were not entitled to any account of that annuity. It was, by Duke *Ralph's* will, specifically bequeathed to trustees, in trust for Lord *Montagu* the grandson for life; and after his death, for such person as should be the heir male of his body; and if there should be no such person, in trust for such person as should be the heir male of the body of Duke *John*, for the residue of the term and estate therein; and if there should be no such person, in trust for Duke *John* for his life; and if these limitations should fail, in trust for such persons as should be entitled to the testator's real estate devised, according to the estates thereof thereby limited. Lord *Montagu* the grandson dying, *George*, the second son of Duke *John*, became entitled to the whole interest in this annuity upon his birth, in the year 1715, either as being heir male of the body of the testator's son *John*, (which words, as they stood in this will, must necessarily be applicable to a son of *John*, in *John's* lifetime, and not wait for their application till the technical meaning of the word *heir* should be ascertained by the death of the ancestor, as was manifest by the subsequent limitation to Duke *John* for life, if there should be no such person;) or as being first tenant in tail of the real estate, the uses whereof the Exchequer annuity was to follow, in failure of the preceding limitations. *George* dying an infant, Duke *John* became entitled to this annuity as his father and administrator. The plaintiffs, however, thought fit to claim a moiety

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moiety of it by their bill, and an account to be taken of the profits. The defendants insisted, that it vested in *George*; and Lord *Northington* was so clearly of that opinion, that he dismissed so much of the bill, as sought an account of the Exchequer annuity, with costs. Their Lordships, on the former appeal, affirmed that dismissal; and directed an account to be taken of the personal estate of Duke *Ralph*, after payment of his debts, legacies, and funeral expences. The object of the account so directed, was presumed to be, to ascertain the clear surplus of Duke *Ralph's* personal estate; which, according to his will, was to be laid out in lands, to be settled as thereby directed. But the Exchequer annuity was not to be laid out in land; and being specifically bequeathed and settled as before stated, it could never make any part of that surplus. Had it not vested in *George*, the second son, it would have vested in the daughters, under the specific limitations, of it, as being the next tenants in tail of the real estate; and besides them, there were many other persons in remainder who would have taken the whole interest, had it not vested under the prior limitations. Nevertheless, Lord and Lady *Beaulieu* thought fit to claim before the Master, upwards of 60,000 *l.* for the profits and gross value of this annuity; though the account to be taken by the Master, was, in the direction of it, expressly confined to the personal estate, after payment of the debts, legacies, &c. and though the very judgment directing that account, had affirmed the dismissal of their bill, so far as it sought an account of the Exchequer annuity, with costs. The only question which could have arisen respecting this annuity, would have been as to the profits between the death of Lord *Montagu* the grandson, in 1711, and the birth of *George* in 1715. But that would have been a question between *George*, and those who were postponed to him in the specific limitations of it; whether those profits should accumulate, and go to *George* with the capital, or whether such intermediate profits belonged to the next takers? This question was presumed to have been already decided by their Lordships, because if the profits had not been held to accumulate, Lady *Beaulieu* would have been entitled to a moiety of them during that period; whereas the bill, so far as it sought an account of the Exchequer annuity, was wholly dismissed. Besides, it has before been determined, that in such a case, the profits are to accumulate until the contingency happens, and then to go with the capital. In no sort therefore, could these profits make

make part of the surplus of Duke *Ralph's* personal estate, to be laid out in lands; under which notion alone, they could be the object of the present account.

And as to the 8th exception, the effect of it was, that the Master had allowed the payment of annuities, and interest of mortgages, out of the rents and profits of the real estate, without making the Exchequer annuity bear a proportion thereof. All the testator's bond debts, as well as those by simple contract, were charged by the report upon the personal estate, of which there still remained a surplus. The only payments allowed out of the rents and profits of the real estate, were for annuities; all of which the origin appeared (except only one of 40 *l.* secured by bond) were specifically granted out of, or charged upon different parts of the real estate; and for the interest of mortgages, which had been made in the usual way of part of that estate. The testator manifestly intended the Exchequer annuity as a provision for the *heir male apparent* of Duke *John*, not subject to any incumbrance; and he made a specific disposition thereof accordingly. The real estate alone was liable to the annuities, as being specific incumbrances thereon; and it appeared, that the testator intended the mortgages likewise to remain a charge upon the real estate; and the direction of their Lordships judgment was, to take an account of the rents, issues and profits of the real estate, *over and above the interest of debts chargeable thereon, and all other outgoings*. But if the general devisees had any title to be eased of the mortgages, it must have been out of the general personal estate only, and that too, after payment of all other debts, legacies and funeral expences; much less could they have compelled specific legatees, to give up any part of their legacies for that purpose. But further, it was submitted, that if bond creditors, whose debts are not direct charges upon any specific part of the real estate, had exhausted the personal estate, not only the specific, but the other legatees would, in equity, have had a right of resorting to the real assets, to be satisfied thereout what had been so taken from them by the bond creditors; such assets being so liable, in the hands of a general devisee, as well as in the hands of an heir. It follows therefore, that had there been no surplus of the general personal estate, which in the present case there was, yet the general devisee of the real estate would have had no right to call upon the

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specific legatees of the Exchequer annuity, to be eased even of bond debts paid out of the real estate; and there was still less colour to call upon those legatees for a contribution towards the annuities, and the interest of the mortgages, which were specific incumbrances upon different parts of the real estate, the whole whereof was generally devised. Lastly, if there had been any foundation for this question, it ought to have been made on the former appeal, and a direction ought to have been prayed to the Master thereon; but it did not appear to have been so much as thought of until after the Master had signed his report, when many exceptions being taken thereto, this was thrown in among the rest.

ORDER
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M. S. Jour.
sub anno 1775.
P. 534.

After hearing counsel on these appeals, it was ORDERED and ADJUDGED, that the original appeal should be dismissed; and that so much of the order therein complained of, as allowed any part of the respondents 9th exception to the Master's report, should be affirmed. And it was further ORDERED and ADJUDGED, that that part of the order complained of in the cross appeal, which over-ruled the 7th and 8th exceptions to the Master's report, should be affirmed. And the appellants in the cross appeal, having waived, upon the 4th, 5th and 6th exceptions, any account of the produce of the two sums of 32,753*l.* 13*s.* 10*d.* and 2102*l.* 2*s.* 8*d.* arising from the lands conveyed in satisfaction, by the articles of the 24th of *June* 1724, and electing to have Duke *John* considered, in respect to the personal estate of Duke *Ralph*, as having received so much money, part of his assets, at the date of the articles: It was DECLARED, that neither the sum of 1000*l.* claimed upon *Annesley's* judgment, nor the sum of 3000*l.* or any part thereof, claimed upon *Coulthurst's* judgment, ought to be allowed; and that the several sums paid by Duke *John* to some of the parties, for consenting to join in the said articles, and for defraying the charges attending the execution and performance of the same, ought to be considered as a charge upon the whole sum of 52,545*l.* 15*s.* 7½*d.* and to be thereout deducted in the first place: And it was therefore ORDERED and ADJUDGED, that the Master should settle the proportion thereof to be born out of the 30,000*l.* and that the remainder of the said sum of 30,000*l.* should be applied in discharge of the several demands of Duke *Ralph* and Duke *John*, rateably and in equal proportions: And it was further ORDERED and

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and ADJUDGED, that the order upon the said 4th, 5th and 6th exceptions, should be affirmed; in so far as the said exceptions were not hereby varied.

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Gustavus Rochfort Hume, and George } Appellants. Case 27.
Rochfort, Esq; his father, -

Henry, Earl of Ely, and others, - Respondents.

2d May 1775.

*See 5. Cruise's Dig.
510. & 1. Ridge's Jr.
Part. Cas. 204524.*

SIR *Gustavus Hume* of *Castle Hume* in the county of *Fermanagh*, Bart. being seised in fee of the town and lands of *Castle Hume*, and of several other estates in the counties of *Fermanagh*, *Leitrim* and *Mayo*, in *Ireland*, of the yearly value of 3000 *l.* and having issue two daughters only, *Mary* and *Alice*, by indentures of lease and release, dated respectively, the 5th and 6th of *August* 1729, conveyed his estates to trustees and their heirs, to the use of himself for life, and after his decease (charged with a yearly rent charge of 800 *l.* to Lady *Alice Hume* his wife for life, and a sum of 5000 *l.* for his second daughter *Alice*) to the use of *Mary Hume* his eldest daughter during her life, remainder to trustees, to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to the daughters of *Mary*, and the heirs of their bodies lawfully issuing; and in default of such issue, remainder to *Alice* his second daughter for life, remainder to trustees to preserve contingent remainders; remainder to her first and other sons in tail male; remainder to the daughters of *Alice*, and the heirs of their bodies; and in default of such issue, then, as to the *Leitrim* and *Mayo* estates, to *Mary Johnson* and *Mary Moore* his nieces, and their heirs; and as to the *Fermanagh* estate, to the Honourable *Alexander Hume*, second son of *Alexander*, Earl of *Marchmont*, for life; remainder to his first and other sons in tail male; remainder to the said *Alexander*, Earl of *Marchmont*, for life; remainder to *Hugh*, Lord *Worth*, the Earl's eldest son, and now Earl of *Marchmont*, for life; remainder to his first and other sons in tail male, with directed remainders over.

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In *October* 1731, Sir *Gustavus* died without issue male, leaving Lady *Alice Hume* his widow, and his two daughters, both then under age, surviving him; and by his will, after several specific legacies to lady *Alice* his wife, he bequeathed the residue of his personal estate, amounting to a very considerable sum, to *Alice* his younger daughter.

In 1736, *Nicholas Loftus* the elder, afterwards created Lord Viscount *Loftus*, being seised of *Loftus Hall*, and of several estates in the counties of *Wexford* and *Queen's county*, of the yearly value of 3000 *l.* and having two sons, *Nicholas*, the father of the late Earl of *Ely*, and the respondent *Henry* Earl of *Ely*, entered into a treaty with Lady *Alice Hume* for a marriage, which was afterwards had, between his eldest son *Nicholas*, and her eldest daughter *Mary*; and accordingly, by a settlement made on the 4th of *August* 1736, reciting, that *Mary Hume* was seised of or entitled for her life to a considerable real estate in possession, subject to a rent charge of 800 *l.* a year to Lady *Alice* her mother, and that the marriage was intended to be had, in consideration thereof, and of the estates which *Nicholas Loftus* the son would become entitled to in right of his intended wife, and for providing a present maintenance for them, and a competent jointure for her, and for settling the *Loftus* estate, Mr. *Loftus* the father conveyed all the *Loftus* estates to trustees and their heirs, as to part, to the use of his son for life, and as to the rest to himself for life; remainder to his son for life, with remainder of the whole to the first and other sons of the marriage in tail male; and if there should be no son, a yearly rent charge was provided out of the *Loftus* estate for the jointure of *Mary*; and subject thereto, to the first and other sons of *Nicholas* the son by any other wife in tail male; remainder to the respondent *Henry*, the second son, for his life; remainder to his first and other sons in tail, reversion in fee to *Nicholas* the father; with powers for providing portions for younger children and daughters. In consequence of this settlement, *Nicholas* the son, in right of his wife, entered on the estates comprised in the settlement of 1729, subject to Lady *Alice Hume* the mother's annuity, and the provision for her younger daughter.

After the marriage, *Nicholas Loftus* the son took and used the name of *Hume*, in addition to his own name, and resided chiefly

at *Castle Hume*, having lodgings only in *Dublin*, at the house of *Richard Moore* in *Capel Street*, where, on the 11th of September 1738, *Nicholas*, the late Earl of *Ely* was born. About two years afterwards, his mother died, and his father, though no longer entitled to the *Hume* estates, continued in possession as the natural guardian of his son, and no measures were taken to carry on any account against him for the benefit of the infant, though both Lord *Loftus* the grandfather, and Lady *Alice Hume* were then alive.

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The care of the infant's person was, by the father's approbation, committed to his grandmother, who with *Alice* her unmarried daughter lived in *Dublin*, and had a small country house called *Scrubbs* in the neighbourhood.

This care she continued during her life with the most dotting fondness, and by several letters written by her and her daughter to *Loftus Hume*, it appeared that his son was constantly mentioned in the warmest terms of affection; they said indeed, that his health required bathing in the sea, that he was backward in his speech, but was playful, and appeared to have apprehension and understanding, though wild and giddy; but no suspicion appeared in this correspondence, of any defect in his faculties. On the contrary, Lady *Alice*, in one of her letters in 1743, said she hoped he would live to be an honour to his family.

In 1746, *Alice* the younger daughter married the appellant *George Rockfort*, who thereupon became intitled to the large provision made for her by her father's settlement and will.

In the year 1748, Lady *Alice Hume* made her will, and having a long term of years in her house in *Dominick Street*, she (among other bequests) devised that house, together with all the furniture, plate and pictures, and all her personal estate and effects whatsoever, not specifically disposed of by the will, to trustees, upon trust to permit her daughter Mrs. *Rockfort* to enjoy the same, until her grandson *Nicholas Hume* should attain the age of 27; and then to permit him to possess the same for 99 years, if he should so long live; and after his death, to permit his first and other sons successively to possess the same, and in default of sons, his daughters; and if all his issue should die be-

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fore 21, without issue, to Mrs. *Rockfort* and her sons and daughters in like manner, with remainder to a son of the Earl of *Drogheda*.

Upon the death of Lady *Alice Hume*, Mr. and Mrs. *Rockfort* having taken possession of the house in *Dominick Street*, their nephew, who had continued with his grandmother to the time of her death, being then about 12 years old, was immediately removed to his father's lodgings in *Capel Street*.

The respondents did not examine any witnesses to this period of the late Earl's life, but it appeared from the appellants evidence, that the Earl's constitution was sickly, that he had a scorbutic disorder, that he was backward in his speech, that whether from Lady *Alice Hume*'s injudicious management (though it was evident she had the greatest affection for him) or from some natural cause, he had early in life a contraction in the sinews of his hams, so that he could not streighten his knees; his infirmities increased as he grew up, and contributed to give him an awkward appearance, which, with the backwardness of his speech, accounted for the opinions formed of him during this period by some of the appellants witnesses.

Loftus Hume kept his son from his age of 12 to his age of 18, at *Moore's* in *Capel Street*, without much attention either to his health or improvement, and the general proof as to this period was, that the son was in a weak state of health when he came to *Moore's*; and although he gained strength during his residence there, yet the contraction in his knees rendered him unable and unfit to stir abroad: However the witnesses said, he had memory, that he was good tempered when pleased, but passionate when vexed, and that he stood in great awe of his father, who was a man of a strange disposition, and uncommon violence of temper. In 1756, he was removed to *Henrietta Street*, his father having purchased a house there, and from thence, in 1757, to a house in the county of *Wicklow*, called *Clermont*, which his father from thenceforth made his country residence.

On the 29th of *April* 1758, the appellant *George Rockfort* and his wife presented their petition to Lord *Bowes*, then Lord Chancellor of *Ireland*, grounded on several affidavits, setting forth

forth her interest in the estate of Sir *Gustavus Hume*, under the settlement of 1729, in case of failure of issue male of the late Earl, the only child of her sister *Mary*; and stating that he was a minor, and had been from his infancy of unsound mind and understanding, and incapable of conducting his own affairs; and praying a commission to be granted to enquire into the capacity and understanding of the said minor, and whether he had ability sufficient to manage and transact his own affairs. And the Court having given leave to *Nicholas* the father, to answer the several matters in the said affidavits, if he should think fit, the petition came on to be heard on the 5th of *June* following, and the Lord Chancellor was thereupon pleased to order a commission to issue, to enquire by a jury of the city of *Dublin*, whether the said *Nicholas Loftus Hume*, the minor, was an idiot, or a person of unsound mind? And if he was, whether he had been so from his nativity, or from any other and what time?

On the 1st of *July* 1758, the commission issued, returnable the 28th of *November* following, and on the 4th of *July* 1758, *Loftus Hume*, the father, was served with notice from the Commissioners, requiring him, upon the 10th of the same month, to produce the minor before them at the *Tbolfell* of the city of *Dublin*, on the execution of the said commission. When this notice was served, the minor was at *Clermont*, in the county of *Wicklow*, in a bad state of health, and therefore could not attend without much danger, of which fact several affidavits were made, and a notice was thereupon given on behalf of the minor, that a petition would be preferred to the Lord Chancellor, to set aside the commission, and that if a commission was necessary to issue, it should be executed in the county of *Wicklow*. And the appellant having at the same time petitioned for a peremptory order on *Nicholas* the father to produce his son, the matter of both petitions came on to be heard on the 7th of *November* 1758, when it was ordered, that the said *Nicholas Loftus Hume* should, on the 15th of the same month, produce the minor before the Commissioners in the city of *Dublin*.

On the 18th of *November* 1758, the appellant *George Rochfort* moved the Court upon affidavit, stating, that the service of the former

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former order had been obstructed, and that *Nicholas* the father intended to carry his son, then a minor, out of the kingdom; and praying, that he might produce the minor in court, on the 27th of that instant *November*, or that an attachment should be awarded against him without further motion, and that he should not remove the person of the minor out of the kingdom, without leave of the Court. Whereupon an order was made by the Lord Chancellor to that effect, which order the said *Loftus Hume* the father refused to comply with; as the inquiry was not directed to be had in the county of *Wicklow*, and therefore an attachment issued against him on the 30th of *November*.

On the 19th of *December* 1758, *Nicholas* the minor, and *Nicholas* the father presented their petition of appeal to the House of Peers, complaining of the said orders of the 5th of *June*, and the 18th and 25th of *November* 1758. But as this appeal complained of orders made on the petty bag side of the Court of Chancery, it did not properly lie, and was therefore withdrawn on the 22d of *February* 1759.

Nicholas the father having refused to produce his son, in obedience to the order of the 7th of *November* 1758, the appellant *George Rochfort* and his wife applied to the Chancellor by petition, on the 16th of *May* 1759, for a receiver; when his Lordship was pleased to appoint *George Rochfort*, to be receiver of the rents of the estate, pending the inquiry which they proposed to prosecute under a new commission, or till the further order of the Court, upon his giving security in the usual manner; and it was also ordered, that all persons should be prohibited from cutting down any trees, without leave of the Court; whereupon Mr. *Rochfort* acted as receiver, and received the rents.

On the 25th of the said month of *May*, a new commission issued, directed to the former commissioners, commanding them to enquire, "Whether the said late Earl was an idiot, or a person of unsound mind?" Which commission was returnable without delay, but was not executed, as *Nicholas* the father still persisted in his refusal to produce his son.

On the 14th of *July* 1759, the appellant *George Rochfort* and *Alice* his wife, and the appellant *Gustavus Rochfort* their son exhibited

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exhibited their bill in the Court of Chancery in *Ireland*, against *Nicholas* the father, and *Nicholas* his son, and *Warden Flood*, Esq; his Majesty's then Attorney General, stating the settlement of 1729, that the minor was born an idiot, and from his nativity had continued to be and then was an idiot, or a person incapable of conducting or managing his affairs; and stating the different commissions issued, and the various orders and proceedings made and had under the first commission, and subsequent thereto; that the minor was near attaining his age of 21, and that *Nicholas* the father, intended to carry into execution a scheme for the said minor's suffering common recoveries of the *Hume* estate, and to send him out of *Ireland*, out of the reach of the process of the Court; and charging, that *Nicholas* the father, under colour of some authority from the son, intended to cut down and destroy the timber on the estate, and to commit other waste, and exercise other acts of ownership over the estate; and that the minor had not sufficient capacity or understanding to put in an answer to the said bill. And therefore praying, that the Court would make a special order for the minor's personal appearance in Court, and that in the mean time such order or orders might be made as the Court should think fit, for the preventing common recoveries being suffered by or in the name of the minor, and for preventing the issuing any process preparatory to the suffering such common recoveries, until the said minor should appear in person; and that such order might be made, or process granted, as should be fit for preventing the minor's being removed out of the kingdom, without leave of the Court.

On the 16th of *July* 1759, *Nicholas* the father, was served with a copy of this bill, and a subpœna to answer the same, and on the 20th of the same month, the plaintiffs in the said cause petitioned the Lord Chancellor, and obtained an order that no common recovery should be suffered by or in the name of the said *Nicholas* the son, of the lands and premises in the settlement of the 6th of *August* 1729, or of any of them, and that no process or commission preparatory to the suffering such common recovery or recoveries should issue, without the special order of the Court; to be obtained upon motion to be made on previous notice; and that *Nicholas* the father, or any other person, should not remove the person of *Nicholas* the son, out of the kingdom,

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without leave of the Court; and that all persons should be restrained from cutting down any woods or timber trees, or committing any waste upon the estate; his Majesty's Attorney General being present, and desiring the same on behalf of the Crown.

On the 22d of *September* 1759, the late Earl came of age; and on the 8th of *March* following, an application was made by petition to the Lord Chancellor, praying, that the order of the 5th of *June* 1758, for issuing the commission against him should be set aside, and that if any new commission was necessary, it should go to the county of *Wicklow*; and praying, that the order of the 16th of *May* 1759, appointing *George Rochfort* receiver of the estate, might also be set aside. And upon hearing this petition, on the 8th of *March* 1760, the Chancellor was pleased only to vary the order with respect to a receiver, viz. that the said *Nicholas Loftus Hume* being then of age, should name a proper receiver to be appointed by the Court, who was to give security to be accountable for the rents; and that the said *Nicholas Loftus Hume* should be allowed 1000 *l. per ann.* from the time of his coming of age, until further order; and that the said *George Rochfort* should account for the rents by him received. In consequence of which, by a subsequent order, made on the 14th of *August* 1762, the Reverend Mr. *John Tench* was appointed agent and receiver, and continued to act in that capacity until he died in 1764, and from that time the rents of the *Hume* estate were suffered to run greatly in arrear.

Upon the death of *Nicholas* Lord Viscount *Loftus* the grandfather, *Nicholas Loftus Hume* his son succeeded to the title of Viscount, and entered upon the possession of the *Loftus* estates, and was afterwards created Earl of *Ely*, in the kingdom of *Ireland*.

This change in his affairs, however, made no alteration in his disposition towards his son, whom he treated with uncommon barbarity; his bodily infirmities were at this time greatly increased by the scurvy, which broke out on his cheek, and by a fall upon the stairs, which disabled him in such a manner that he could only move about with the assistance of chairs. Mr. *Tottenham* his uncle, who saw him frequently about this time at *Clermont*, observed a gradual decrease in the strength of his limbs, which he chiefly

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ly attributed to want of air and exercise, neither of which the late Earl could have the benefit of, not being able to walk, and his father having excused himself from keeping a carriage for him, because he was deprived of the rents and profits of his son's estates, and on account of the great expence he was at in defending him against Mr. *Rockfort's* attacks. This was the situation of the late Earl, when his father *Nicholas* Lord *Loftus* and Earl of *Ely* died, on the 31st of *October* 1766, intestate, leaving the late Earl his only son, who succeeded to his father's honours and estates, then consisting of the *Loftus* and *Hume* estates, both of about the yearly value of 6000*l.*

Soon after his father's death, the late Earl came up with his uncle the respondent, his nearest relation on his father's side, to his house in *Cavendish Street*, where he was attended by Dr. *Robinson*, Dr. *Quin*, and Mr. *Daunt* a surgeon, gentlemen of great eminence, and by the care and attention employed about him, he visibly grew better, and recovered in a great degree his health and spirits.

On the 17th of *December* 1766, an application was made to the Lord Chancellor, that the present respondent, or such person as the Earl should think proper, should be appointed receiver of the rents of the *Castle Hume* estate; and on the same day, the appellant *George Rockfort*, without any previous notice of his purpose, made an application to the Court, that a new commission might issue, to try the ideotcy or insanity of the Earl; and the counsel on the part of the Earl, consenting to the issuing such commission, an order was made accordingly; but the Lord Chancellor would make no order on the application for a receiver, declaring, that the Earl was under no legal disability. Whereupon the Earl appointed the following persons agents of his estates in the following counties, viz. *Richard Haffard*, in the county of *Fermanagh*; *Patrick Cullen*, in the county of *Leitrim*; and his uncle *Charles Tottenham*, in the county of *Wexford*.

On the 19th of *December* 1766, a new commission issued, directed to *Hercules Langford Rowley*, and *William Brownlow*, Esqrs; two of his Majesty's most Honorable Privy Council in *Ireland*, *Charles Walker* and *Francis Vezey*, Esqrs; two of the Masters of the High Court of Chancery in *Ireland*, *George Smith* and *William Henn*,

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Henn, Esqrs; two of his Majesty's counsel, learned in the law, *Arthur Pomeroy*, Esq; Knt. of the shire for the county of *Kildare*, *Ralph Howard*, Esq; Knt. of the shire for the county of *Wicklow*, *William Sharman*, Esq; and *Thomas Cooke* and *Percival Hunt*, Esqrs; two of the Aldermen of the city of *Dublin*, commanding them or any five or more of them, (whereof the said *Walker*, *Vezey*, *Smith*, or *Henn* to be one) personally to examine the said *Nicholas* Earl of *Ely*, by ways and means whereby they might be fully informed, whether the said *Nicholas* Earl of *Ely* was an ideot, or person of unsound mind, and if he was, then whether he had been so from his nativity, or from any other and what time.

On the 9th of *January* 1767, eight of the commissioners named in the said commission, met in the Chancery Chamber in the four Courts in the city of *Dublin*, to open their commission, and settle the manner of conducting their enquiry; and the said *George Rockfort* and the respondent and their agents being present, and the commissioners having fixed the time and place for executing the said commission, they issued out their precept to the sheriffs of *Dublin*, to return a jury accordingly. And the commissioners among themselves came to several resolutions, with regard to the manner of examining the said Earl, and their future conduct in the execution of the commission; which resolutions they imparted to *George Rockfort*, and the respondent the now Earl of *Ely* and their agents, and which were approved of by all parties.

On the 19th of the said month of *January*, nine of the commissioners met at the Lying-Inn Hospital, and the sheriffs of the said city of *Dublin* attended, and returned a jury of 24 persons for the trial of the question. The commissioners then proceeded to the further execution of the commission, when the counsel who attended on the behalf of *Rockfort*, and his wife and son began with opening their case, and insisted on calling and examining evidence of the state of mind of the Earl from his nativity, in order, as it was alledged, that the commissioners and jury might be enabled to point their questions to the proper objects of the enquiry; and thereupon several witnesses were produced and examined on the part of Mr. *Rockfort* and his wife, and the examination continued for three days and a half. Divers witnesses were then produced and examined on the part of the Earl.

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and several letters were produced, which had been written by Mr. *Rochfort* and his wife before her marriage. The commissioners and jury, being possessed of the evidence given on both sides; on the 6th day, being the 24th of *January* 1767, met and proceeded to the personal examination of the Earl himself, and examined him for a considerable time; the chairman then gave a charge to the jury, and they unanimously agreed on their verdict, and found, that the said *Nicholas Hume*, Earl of *Ely*, in the said commission named, was not, at the time of taking that inquisition, an idiot, or a person of unsound mind; and the nine commissioners agreed in opinion with the jurors.

On the 7th of *February* 1767, an application was made to the Court of Chancery, by motion, that the order of the 20th of *July* 1759, restraining the Earl from suffering a recovery of his estates, might be discharged; and, after taking up four days in hearing, the order was discharged. But, on the 11th of the same month, a petition of *George Rochfort* and his wife was heard, praying, that the inquisition taken on the said commission might be set aside, and that his Lordship would be pleased to examine the Earl personally, or that a new commission might issue; when his Lordship declared, he saw no reason for making any order on such petition.

On the same day, a deed of bargain and sale was executed by the Earl, for making a tenant to the precipe for suffering recoveries, and declaring the uses thereof to himself in fee; and attested by Mr. *Hellen*, one of his Lordship's counsel, and the Reverend Mr. *John Nixon*. The Earl also signed warrants of attorney for suffering the recoveries, and both the witnesses proved that Mr. *Hellen* and Mr. *Carrol*, the Earl's solicitor, explained to him the nature and effect of the deed in familiar terms, and that he comprehended the meaning and intent thereof. In the evening of the same day, the deed, and also the warrants of attorney, were acknowledged by the Earl, in the presence of the Lord Chief Justice *Clayton*, who came to the Earl, at his request, to take the acknowledgments. And in consequence of this deed, and the warrants of attorney, a recovery was suffered of the Earl's estates, as of *Hilary* Term 1767; and the reason given by one of the witnesses, why they were suffered by warrant of attorney, was, because the Earl being lame, and unable to walk, his being

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carried into Court in the arms of servants, would have been disagreeable to him.

On the 15th of *April* 1767, the appellant *Rochfort* and his wife, and *Gustavus* their son, appealed to the House of Lords from the order of the 5th of *January* 1767, relating to the manner of striking a jury under the commission; the order of the 11th of *February* 1767, discharging the restraining order of the 20th of *July* 1759, and an order of the 13th of *March* 1767, refusing a new commission; and by their petition of appeal particularly stated, that recoveries had been suffered by the Earl in consequence of these orders; that the remainders limited to the then appellants by the settlement of 1729, were thereby barred; and that the appellants were remediless, if the said orders should stand.

The Earl having heard that the castle of *Rathfarnham*, built by one of his ancestors, was to be sold, requested his cousin Mr. *Ponsonby*, then speaker of the House of Commons, Mr. *Nixon*, and his uncle the respondent, to take a view of it, which they accordingly did; and having represented it to him as an eligible purchase, the Earl declared he should be glad his uncle would purchase it for him, as it would give him pleasure to have an estate that had formerly been in his family brought back. In consequence of which, his uncle the respondent, agreed for the purchase for 17,500 *l.* for the payment whereof, it was necessary that the Earl should borrow money; and accordingly, on the 26th and 27th of *March* 1767, *Thomas Finley*, Esq; and company, bankers in *Dublin*, lent him, upon his bonds and warrants of attorney to confess judgment thereon, 8000 *l.* and by deeds of lease and release, dated the 1st and 2d of *April* following, *Beltingham Boyle*, Esq; in consideration of 17,500 *l.* paid or secured to him, conveyed the estate of *Rathfarnham* to the Earl and his heirs, for the then existing lives (the interest being a lease for lives renewable for ever). At the execution of the deeds, 5500 *l.* was paid; the estate was subject to a mortgage for 7000 *l.* which was to be paid on the 25th of *March* following, and the Earl, by a separate deed, covenanted to pay the remainder of the purchase money, being 5000 *l.* on the 25th of *March* following, which was accordingly paid, by further sums borrowed by the Earl, on bond and warrant of attorney.

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In *Trinity* Term 1767, the Earl, to prevent any objection that might be made to the former recoveries in point of form, suffered recoveries again in this term; the tenant to the precipe being made by fine, which the Earl acknowledged before the same Chief Justice of the Common Pleas, who since his first interview had dined with the Earl, and by that means had a further opportunity of judging of his capacity.

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The Earl being desirous to make some provision for his aunt *Loftus*, and to settle his estate in his blood and family, by deeds of lease and release, dated the 11th and 12th of *November* 1767, in consideration of the great care, attention and affection of his aunt *Loftus*, and for other considerations therein mentioned, conveyed all his estates to Lord *Mount Casbell*, *John Ponsoby*, then speaker of the House of Commons, and Sir *James May*, of *Mayfield*, in the county of *Waterford*, Bart. and their heirs, upon trust, to pay an annuity of 500*l. per annum* to Mrs. *Loftus* for life, in case she should survive her husband, and subject thereto to himself for life, with remainder to his first and other sons in tail male; with remainder to his daughters in tail general; with remainder to his uncle the respondent, in fee. With a power to himself of leasing, making a jointure, and charging portions for his younger children; and a general power of revocation, with the consent of the trustees.

On the 29th of *February* 1768, the appeal came on to be heard; when their Lordships were pleased to order, that with respect to the order of the 5th of *January* 1767, refusing the application for a special jury, and the order of the 13th of *March* 1767, refusing the application for a new commission, the appeal should be dismissed; and with respect to the order of the 11th of *February* 1767, which discharged the order of the 20th of *July* 1759, whereby the Earl was restrained from suffering recoveries, that the same should be affirmed.

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On the 6th of *November* 1769, the Earl executed his last will, whereby he gave and bequeathed all his real and personal estate to his uncle the respondent, and made him sole executor; which will was attested by the Right Honourable *John Ponsoby*, Sir *Henry Cavendish*, and Sir *James May*; the two first of whom were examined in this cause. Sir *James May*, at the time of the

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the examination being dangerously ill, at the distance of 90 miles from *Dublin*, could not be examined; but he having been before examined to the proof of the will in the Prerogative Court, it was not thought of sufficient consequence to delay the hearing of the cause, for the sake of a repetition of his evidence; and they both said, that the Earl was of sound mind, memory and understanding, at the time of the execution of his will. They also gave a particular account of what passed at the time of the execution; the substance of which was, "That in consequence of
 " messages received by them, they, and Sir *James May*, met in
 " the parlour at the Earl's house, where the present Earl and his
 " lady were, and a message being brought from the late Earl
 " desiring they would go up to him, they all went up. They
 " found the Earl sitting at a table, and upon their entering, he
 " bowed, and enquired after their healths, and said he had sent
 " for them to request they would witness his will, which then
 " lay upon the table before him; he appeared weak and faint
 " and spoke faintly. The will was then read to him; and after
 " it was read, Sir *James May* asked the Earl, whether that was
 " the will he intended to sign, to which he answered it was, and
 " that he intended to leave all his property to his uncle. Sir
 " *James May* asked him, why he had made such a disposition of
 " his fortune as he had done by his will; when he pointed to
 " his uncle, and said he gave his fortune to him, because he had
 " been always a kind and affectionate uncle to him: He then
 " executed duplicates of the will. Immediately after the will
 " was executed, Mr. *Ponsonby* asked him, whether he had any
 " other commands, as he was obliged to go upon business,
 " which the Earl made no answer, but bowed, and Mr. *Ponsonby*
 " left the room; when he was got to the head of the
 " stairs, he was desired to return into the room; and having
 " gone near the Earl, he said, Mr. *Speaker*, I request it of you
 " that you will keep my will; to which Mr. *Ponsonby* answered,
 " ed, that he certainly would comply with his Lordship's re-
 " quest."

On the 8th of *November*, in the evening, the Earl began to grow worse, and to shew signs of a delirium; and from thence his fever increased until on the 12th, when he died.

Upon the Earl's death, a caveat was entered by the appellant, in the Ecclesiastical Court, against the proof of the will; so that it became necessary for the respondent, to institute a suit for proving the will in special form of law; and accordingly the will was proved, upon the oaths not only of the subscribing witnesses, but of other witnesses also, to his sanity and capacity of disposing of his property.

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On the 30th of May 1770, a bill was filed in the Court of Chancery in *Ireland*, by the appellants, against the respondent the Earl of *Ely*, and others; stating the settlement of 1729, and several of the proceedings before mentioned, and charging the general incapacity of the late Earl, arising as well from natural as accidental causes, to manage his affairs, or do any act towards disposing of his estate; and therefore praying, that the deeds declaring the uses of the fines and recoveries, might be set aside, and the fines and recoveries declared to enure to the uses of the settlement of 1729; that the respondent might convey the estates to those uses, and might account for the Earl's personal estate; that the leases and grants of annuities made by the Earl, might be set aside; and that the respondent might be restrained from receiving the rents and profits.

To this bill the respondent filed two pleas, and an answer. And, as to that part of the bill which related to the Earl's personal estate, he pleaded, that a suit had been duly instituted by him in the Prerogative Court of *Ireland*, for the proof of the Earl's will, whereby he bequeathed to the respondent all his personal estate, and named him his sole executor. That he was proceeding according to the course of that court, to establish the will, and that the said suit was still depending and undetermined. And as to so much of the bill, as sought to set aside the deed declaring the uses of the fines and recoveries, and a reconveyance to the uses in the settlement of Sir *Gustavus Hume*, or that sought any relief touching the *Hume* estates, or any discovery or relief touching any leases made, or annuities granted by the Earl; the respondent pleaded, that the late Earl of *Ely*, at the time of executing the deed of the 11th of February 1767, and of levying the fines, and suffering the recoveries, was of sound mind, memory, and understanding, so as to be capable of executing deeds, good and valid in the law, and of levying fines,

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and suffering recoveries, good and valid in law. And he then stated particularly, the bill filed in *July* 1759, by the appellants, the order of the 11th of *February* 1767, the application of the appellants for a new commission, and the proceedings upon that application; the appeal to the House of Lords, and the proceedings on that appeal; the second application for a new commission, and the refusal of the court to make any order thereon; the two sets of recoveries, and the fines levied by the late Earl. And he further pleaded, that by virtue of the said common recoveries, the said Earl became seised in fee, and being so seised, died on the 12th of *November* 1769, unmarried, and without issue; leaving the respondent his uncle and heir at law, who thereupon became seised in fee of the several estates, of which the late Earl was seised in fee. And the respondent, by his answer, denied that any fraud, imposition, or undue influence, had been practised upon the late Earl, in obtaining the said fines or recoveries.

These pleas were argued on the 3d of *May* 1771, and after several days hearing, the Lord Chancellor was pleased, on the 25th of *June* following, to order, that so much of the first plea, as related to a discovery of the personal estate, and to the relief that might be necessary for the preservation of it, should be over-ruled. And as to the rest of the said first plea, that is to say, with respect to the will, and all the charges of fraud and imposition, in obtaining the same, he ordered that the plea should be allowed. And as to the second plea, which related to the real estates, he ordered that it should stand for an answer, with liberty to except.

In consequence of this order, the plaintiffs took exceptions to the answer, which were submitted to, and a full answer was put in by the respondent, upon which issue was joined, and witnesses were examined on both sides.

The depositions of the witnesses, to the capacity of the Earl, referred to three different periods: First, during the time he lived with his grandmother; Secondly, from her death, to the death of his father; Thirdly, from thence to his own death. In the first period, no witnesses were examined for the respondent, and those examined for the appellants, proved in general the infirmity of the Earl's health, the backwardness of his disposition

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sition, arising from a sickly constitution, and an improper treatment. They also proved fully, the extreme fondness and indulgence of his grandmother, and the favourable opinion that both she and her daughter, *Mrs. Rochfort*, entertained of him. The depositions in the second period, exhibited a very melancholy picture of his father's barbarity and neglect, but they also shewed strongly, the sensibility of a mind, unimproved, and depressed by harsh usage; though capable of receiving the little instruction afforded him, and of forming very just ideas, of the merit and demerit towards him, of the persons with whom he was conversant. In the third period, persons of the greatest integrity and character had frequent access to him, and they proved, that his behaviour was rational, and even polite, that he was very sensible of the difference, between those who had been kind, and those who had been unkind to him; that there was no inconsistency or extravagance in his conduct; and that his affection to his uncle and his family, and disinclination to *Mr. Rochfort* and his family, were constant. That no imposition or influence was practised upon him, but the greatest attention used, that he should be fully apprised of the nature and effect of every act which he did. To this evidence on the part of the respondents nothing was opposed, but the testimony of a discarded footman, and a barber, who saw him once when he was shaved, and that of two commissioners, and one juryman upon the inquisition, who saw him only at the time of his examination, when they found him *not* to be of unsound mind.

On the 11th of *January* 1773, the cause in the Court of Prerogative was heard; when the validity of the will was decreed, no counsel appearing on behalf of the appellant, to controvert the due execution, or the validity thereof; and a probate having been granted in special form to the Earl, it finally determined the claim of the plaintiff to the personal estate of the late Earl.

The cause in Chancery came on to be heard before the Lord Chancellor, on the 25th of *April* 1774, and continued in hearing 21 days, in that and the succeeding term, during which time, all the evidence, and the several matters before stated, were fully discussed, and on the 4th of *July* 1774, his Lordship declared, that as to the personal estate, the decision on the will in the Prerogative Court, had finally determined that claim, and therefore

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therefore, he was pleased to dismiss the appellants bill, as to the real estate, without costs.

E. Thurlow.
A. Forrester.

From this decree, the present appeal was brought, and on behalf of the appellants it was said, that the relief sought by the bill, as to Sir *Gustavus Hume's* real estate, was founded on the late Earl's total weakness of mind, and his incapacity of knowing the nature and consequences of the several acts he was drawn into, or of expressing their import, otherwise than by words put into his mouth by the persons placed about him; and unless it could be established, contrary to law and reason, that there can be no weakness or unsoundness of mind, but what amounts to ideocy or lunacy, there never yet had been a fair and legal trial of the Earl's sanity: The chairman who presided on the inquest, having misdirected the jury, by telling them that the words *ideocy* and *unsoundness of mind* were synonymous, which they clearly are not; and here was not only incontestible evidence of the Earl's being a person of the lowest degree of understanding, and next to ideocy, but that evidence was strongly confirmed by the whole conduct of his father, and of the respondent his uncle towards him; who certainly best knew the state of his mind, and left no room to doubt their thinking him of unsound mind. Admitting therefore on the one hand, that courts of equity will not measure the degrees of men's understanding, or adopt ideas of an equitable incapacity, where there is not a legal one; it must be equally admitted on the other hand, that they always determine upon the acts of weak persons by the strictest rules; keep a close attention to the degree of influence which they may be under from persons about them, and require full and clear evidence, that the deeds of such persons were executed on their own mere motion; that instructions for preparing such deeds were given by them, and counterparts thereof delivered to them, &c. But in the present case, the respondent had totally failed in proving the several deeds and instruments under which he claimed, to have been obtained in such a manner as they ought, from a person of so low an understanding as the late Earl was, if any at all he had. If however, the several deeds, fines, and recoveries of the late Earl, were proved to have been transacted by his own direction, yet it appeared manifestly, that they were primarily obtruded upon him by his counsel and agent, in breach of their trust and duty, in counteracting the wisdom of Courts of Equity, who with rather

to restrain than enlarge the dominion of weak persons over their estates: But those gentlemen were in fact the counsel, and law agent of the respondent, and appointed by him; nay one of them on his cross examination acknowledged, that he would not have advised the late Earl to suffer the recoveries, if the suffering them would have diminished the respondent's prospect of enjoying the estates. From this confession it plainly results, that the only person meant to be affected by the recoveries, was the appellant, *Gustavus*; while the Earl was under the tutelage, and in the custody of the respondent; and this improper conduct of the counsel, came home to the respondent himself, who had thus beset his nephew with proper instruments for carrying on his own purposes. The late Earl's resentment against the appellant *George*, for suing out the commission, was assigned as the principal incentive to his suffering the recoveries; but the truth was, and so it appeared from the proofs, that he was incapable of resentment, otherwise than as it was instilled into him. It was therefore a fraud in the Earl's father, and in the respondent and his dependents, to incense and exasperate the Earl against the appellants; and the respondent could neither be suffered to avail himself of the frauds of others, nor of those committed while the Earl was in his custody; for as to these last, since he was to be thereby benefited, he must be presumed the author and director of them.

But supposing, if it could be supposed, that the late Earl was neither of weak mind, nor imposed upon, yet he was avowedly illiterate; and as there was no proof that the deed of the 11th of *February* 1767, making the tenant to the precipe in the recoveries suffered in *Easter* Term 1767, or the warrants for those recoveries, or the acknowledgments of the fines levied in *Trinity* Term 1767, or the warrants for the recoveries in that term, were ever read to the Earl, these several fines and recoveries must be considered as nullities. Nay, was the defect of reading confined singly to the deed of *February* 1767, as it appeared upon inspection, to declare the uses not only of the recoveries in *Easter* 1767, but of all subsequent recoveries between the same parties, if that should fall, the recoveries suffered in *Trinity* 1767, must also fall with it; and the consequence of the invalidity of these recoveries, at law or in equity, for all or any of the above reasons, would be, that if they were void at law, the late Earl

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remained seised, as he originally was, under the settlement of 1729; if void in equity, that the uses ought to be declared to enure to that settlement. But the settlement of *November 1767*, and the will obtained from the late Earl, further evinced the nullity of these recoveries, by pointing out the fraudulent intent in getting him to suffer them; and that they altogether made but one transaction, and must be taken so, was avowed by the respondent himself, who had consolidated into one title, his claim as heir under the settlement, and as devisee under the will. To this must be added, the late Earl's declaration to the Chief Justice, *that he did not mean to cut out his uncle Loftus, as he was a good uncle*. But as the uncle could not be effectually secured without a settlement in his favour, therefore this of *November 1767*, was procured; which was not only fraudulent upon the face of it, but attended with such suspicious circumstances, with regard to the time of its being executed, and whether it was not substituted in the place of some other, as merited a farther enquiry. But its being evidently fraudulent, tainted and polluted the whole of the preceding transaction; by demonstrating, that the [Earl was persuaded to suffer the recoveries, whereby he acquired the dominion over his estates, merely to give the respondent an opportunity of instantly taking that dominion from him. This connecting one part of the transaction with the other, was founded upon the strictest legal principles; the law reasons thus, even in the case of capital offences; and a Court of Equity will not reason less liberally, but consider the respondent's manifest fraud in *November 1767*, as conclusive evidence of his fraud in *Hilary Term 1767*, and make him a wrong doer *ab initio*. As to the will, if the recoveries fell, that would of course fall with them. The appellants proofs of the late Earl's total weakness and incapacity, and of his absolute submission to the will of those in whose custody he was for the time being, were so strong, as, in their apprehension, to entitle them to an immediate decree, rescinding all his acts to their prejudice. But admitting doubts to have arisen in the breast of the Chancellor, from the evidence adduced by the respondent, an issue * ought certainly to have been directed, for enquiring into the degree of the Earl's incapacity, and whether the several deeds, warrants of attorney, fines and recoveries, executed, levied and suffered by him, were or were not obtained from him by fraud and misrepresentation; and whether he

* *Wright v. Eynor*, 1 Bur. 390.

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he really did or did not know the import and effect of them. But this hasty dismissal of the bill, without such enquiry, seemed totally unwarrantable. And if it was wrong as to the real, it was equally so as to the personal estate; the only difference between them being, that the respondent had obtained probate by sentence of the Prerogative Court; but that sentence was immediately followed by an extrajudicial appeal, which was still depending; and there could be little doubt, that if the appellants should recover the real estate, on account of fraud upon the late Earl, or his want of capacity, the sentence of the Prerogative Court would be reversed.

But two objections are chiefly relied upon by the respondent; I. That the right of the appellant *Gustavus*, under the settlement of 1729, is of no consideration, being a remainder after an estate tail. II. That fines and recoveries are of so high a nature, that it is not in the power of a Court of Equity to controul their legal operation, or direct the uses of them according to equity and conscience.

To the first objection it was answered, that the appellant *Gustavus* was not merely a remainder-man, but the grandson and heir of the person from whom the estate moved, and therefore stood in a very favourable light; and even in that of a remainder-man after an estate tail, could in equity oblige an heir general to discover, and bring into Court all deeds and writings, and to see whether his remainder had been properly barred or not. A remainder-man after an estate tail, is so far considered interested in the estate, that he cannot be a witness in any question concerning it.—When money is agreed to be laid out in land, to be settled on *A.* in tail, so far does a Court of Equity regard the remainder-man's interest, that it will not give the money to *A.* but will lay him under the difficulty of purchasing lands, and suffering a recovery of them, in order to give his chance of the death of *A.* before such acts can be accomplished. At law also, in case of a recovery to be suffered by the King's Seal, it is never admitted without the consent of the persons in remainder, and without a strict examination into the ends and purposes for which the recovery is to be suffered *.

In

In support of the doctrine here laid down, were cited the cases of *Suffolk v. Ward*, 1. *Wms.* 179. *Reeves v. Reeves*, 9. *Mod.* 132. *Legatt v. Sewell*, 1. *Eq. Ab.*

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In answer to the other objection, it was said, that had a tenant in tail, before the statute of uses, been induced by fraud to levy a fine, or suffer a recovery, the person injured by the fraud would certainly have had the subpoena, and the cognizee of the fine, or the recoveror, would have been directed by Chancery to convey and divest himself of the legal estate, so fraudulently acquired. The power of Equity is not at all impaired by that statute; and though the Judges in Courts of Law, determine according to Equity in cases of uses, yet the power of directing the uses of fines and recoveries unduly obtained, is more extensively and beneficially exercised by a Court of Equity, than it can be by a Court of Law; inasmuch as a Court of Equity can model and direct the uses, so as to render fines and recoveries fraudulently obtained from a weak man, as beneficial to him, his children, and just creditors, as they ought to be; and at the same time deprive the person guilty of the fraud, of any advantage whatsoever under them. A Court of Equity can say, but a Court of Law cannot, thus far shall a fine and recovery operate, and no farther; and it is evident, that Lord *Hardwicke* would never have made an order on the petition of *Richard Leigh*, in the very remarkable case of *Bennet v. Vade**, if he had not been clear, that upon the petitioner's proving the allegations of his petition, it was in his Lordship's power, as Chancellor, to direct the uses of the recovery suffered by Sir *John Leigh* in 1737, to enure to those of the will in 1690, under which the petitioner claimed as remainder-man; and that to the prejudice of the innocent heirs at law of Sir *John Leigh*, who claimed the estate under the recovery†.

* 2. Atk.
324.

A. Wedderburn.
J. Dunning.
J. Madocks.

On the part of the respondent, it was said to be not only proved in the cause, that the Earl was of competent understanding, and capable of making a disposition of his property, but it was so found in his lifetime before a respectable commission and by a jury of distinguished rank and character, upon a personal examination of the Earl, and now stands upon record

Ab. 394. *Cadwell v. Shadwell*, 1. Wms. 485. *Short v. Wood*, Ibid. 133. *Ey*
case, 3. Wms. 14. *Phipps v. Stewart*, 1. Atk. 285. *Pigot's Recov. c. 3.*

† To support this doctrine, were cited, *Clark v. Ward*, Preced. in Chan. 1.
Goodright v. Brown, 1. Ch. Ca. 49. *Barnsley v. Powell*. 1. Vezey 289. Sir B.
Wentworth's case, 2. Vezey, 403. *Cookman v. Ferrars*, Skin. 14.

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the Court of Chancery in *Ireland*: And the several fruitless attempts made by the appellants to encounter this verdict, served only to confirm it. That the order of the Court of Chancery, restraining the Earl from suffering recoveries of his estates, founded upon the suggestions of the appellants, was afterwards discharged; and he was left at liberty to suffer recoveries, if he should think proper. This order of discharge, was afterwards affirmed upon an appeal; so that the competency of the Earl to dispose of his property, had been affirmed in every jurisdiction through which the question had passed; although it had in every jurisdiction been opposed and controverted by the appellants. That the Earl's competency had not only been thus decided upon, but in the present cause was admitted, even by the appellants; since if he had not been of a capacity to make a valid disposition, the deed on which the recoveries were founded was void at law, and the appellants suit must have been in a Court of Law; whereas by seeking relief in Equity, the appellants admitted his legal capacity: And therefore there could be no ground in Equity to support a different decree from that which was appealed from, or to disturb the acts which the late Earl exercised over his property, unless some proof of fraud practised upon him had appeared in the case, of which there was scarce a suggestion, and much less any proof in the cause.

Where the degree of capacity, which is competent to make dispositions of property valid in law, is once ascertained to belong to the party disposing, all beyond is resolved into a dispute about the several degrees of light and shade, which brighten or obscure the understanding; these are very difficult to be distinguished, and cannot be precisely marked out; and therefore the strength or weakness of understanding, above the degree of competency, serves only as a circumstance of evidence, where the question is a question of fraud; for to give it any other effect, would be of the most dangerous consequence in the transactions of men. The present case was a strong instance of the impossibility of measuring, and precisely defining the size of the understanding of a person competent; and more especially after his death, when the matter is to be ascertained by the opinions of witnesses, whose faculties and degrees of understanding differ among themselves; and who can no otherwise represent a state of the case for the opinion of others, than by relating in-

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stances of conduct and conversations, which when stripped of the many circumstances that must necessarily attend them, give but a very imperfect idea of the true state of the fact. And yet the evidence in this cause, immediately applicable to the matter in question between the parties, afforded the clearest and strongest light to prove, that the Earl's suffering recoveries of his estates, proceeded from causes the most natural and probable, and such as would have produced the like effect in any degree of understanding, not divested of resentment and affection. And though this evidence applied to the several periods of the Earl's life, from his birth, to the death of his grandmother, when he was 12 years old; from thence to his removal to *Clermont*, when he was 18 years old; and from thence to the death of his father, when he was 28 years old; yet as the competency of his understanding was perfectly established, as not to be capable of the least doubt or controversy; it follows, that the material part of the evidence to the present question, was that part of it, which more immediately related to his suffering the recoveries, and making the dispositions which the appellants would object to.

It was very remarkable, that in all the Earl's conversations, related by the witnesses on both sides, there were no instances of his expressions or his actions, that betrayed a want of understanding in matters in which he was conversant. He appeared to those who saw him, and were about him, under great disadvantages from his bodily infirmities; the same infirmities keeping him constantly confined to his chair, and depriving him of those opportunities which conversation and habits with the world produce, narrowed his experience, and deprived him of ordinary improvements; it was not therefore to be wondered at, that his appearance furnished impressions to his prejudice; but the evidence demonstrated, that his understanding was equal to the acts he exercised over his property, and that those acts proceeded from natural motives. It was also manifest, that the Earl was subject to passions; and amongst others, to anger; which broke out sometimes to his servants, though in general he had a natural turn to civility and complacency. It was proved beyond a doubt, that he had, at a very early period, conceived a great degree of resentment against the appellant Mr. *Rockfort*, on account of his proceedings against his father and himself; which occasioned him to use the harsh expressions that appeared in the cause. This resentment

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continued until his father's death, and was again revived by Mr. *Rochfort's* subsequent proceedings, and his actually procuring the commission of ideocy to be executed. In the mean time, the respondent, conscious that there was no just foundation for issuing such a commission, met the proceedings, and facilitated the execution of it. This conduct and behaviour towards his nephew, was evidently founded upon an affection for him, and a desire to promote his ease and happiness. It did not consist in indulgence and artful blandishment, but in an attention to, and care of his health; in furnishing him with all proper accommodations, and gratifying his wishes, by an attention to his controversy with Mr. *Rochfort*. That this had an effect upon the Earl, was evident from his declarations; for upon every occasion which offered, he never failed to express his sense of the gratitude he owed his uncle, and the affection he bore for him and his aunt. It was also proved beyond all doubt, that the Earl had formed a resolution of preventing the succession of his mother's estates from taking effect in Mrs. *Rochfort's* family, and of fixing the succession of all his estates in his uncle, the present Earl, in case he should himself die unmarried, and without issue; of which he did not appear to have wholly despaired, notwithstanding his bodily infirmities. There was likewise evidence in the cause, that he paid attention to the dignity in the *Loftus* family, but he seemed to have proceeded more immediately upon his personal regard for his uncle; and considering that there were two peerages in the family, to one of which, namely, the *Loftus* peerage, his uncle must succeed, and might, by favour of the crown, obtain the earldom, which afterwards happened; considering also, that the *Loftus* estate was unequal alone to the rank of the family, and that the grandfather, Lord Viscount *Loftus*, had purchased the *Hume* estate by the settlement of his own; it was by no means unreasonable, that the estate of an ancient family should be improved, by the accession of another of equal value, brought into it by a marriage. And had the Earl been of the first rank of understanding, no one could, without absurdity, have suggested, that under the circumstances of his father's family, his suffering recoveries of both estates, was any other than an act perfectly just and proper. That the Earl perfectly understood the effect of the recoveries which he suffered, was evident, not only from what passed when the Lord Chief Justice *Clayton* took his acknowledgement

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ment of the bargain and sale, but from the concurrent testimony of other declarations made by him.

Under these circumstances, a court of equity could not strip the heir of the Earl of *Ely*, of any of the estates of which the recoveries were suffered. The Earl having a sufficient capacity in law to do any act over his estates, knowing the effect and consequence of the act he did, it being an act for his own benefit, and to enlarge his interest in his own estates; no evidence of fraud, imposition, misrepresentation, or undue influence appearing in the cause; to have done otherwise than dismiss the appellants bill, would have been an arbitrary act, not founded upon any principle, and unwarranted by any precedent.

DECREE
affirmed.
M. S. Jour.
sub anno 1775.
p. 686.

Accordingly, after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 28. *Nathan Goodright*, (on the demise of *William Rolfe*, and *Elizabeth* his wife) } Plaintiffs
- } in Error.
Frances Harwood, - Defendant }

9th May 1775.

3 Wilf. 497.
2 Black. 537.

IN *Hilary* Term 1772, an ejectment was brought in the Court of Common Pleas, by the lessors of the plaintiff, against the defendant, for recovering a set of chambers in *Lincoln's Inn*. And in *June* following, the cause came on to be tried, when the jury found a special verdict; stating a marriage settlement made in 1688, by *John Lacy* of *Tottenham High Cross*, in the county of *Middlesex*, previous to his marriage with *Susannah* his wife, of certain lands, to certain uses therein mentioned; and also a private act of Parliament passed in 1708, whereby the freehold lands comprised in that settlement, were vested in trustees upon trust to sell the same, together with other estates, for the

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several purposes therein expressed; and amongst others, to raise the sum of 10,000 *l.* to be laid out in the purchase of lands, to be settled to the uses of the said settlement. That the said settled and other estates were sold, and the said sum of 10,000 *l.* thereby raised, but never invested in the purchase of lands. That the said *John Lacy* died in the year , and the said *Susannah* his wife, in the year , leaving issue of their bodies two sons, *John Lacy* of *Lincoln's Inn*, Esq; their eldest son, and *Arthur Lacy*, Esq; and three daughters, *Susannah*, *Elizabeth* and *Mary*. That the said *Arthur Lacy*, son of the said *John* and *Susannah* his wife, died in *September* 1737, leaving *Elizabeth*, one of the lessors of the plaintiff, his only surviving child. That the said *Elizabeth*, in *June* 1753, intermarried with *William Rolfe*, the other lessor of the plaintiff. That the said *Susanna*, the eldest daughter of the said *John Lacy*, died in the year 1721, unmarried; and the said *Elizabeth*, the second daughter, intermarried in 1725, with *John Biscoe*, Esq; and died in 1762, leaving issue by him *Ann*, who, in 1754, intermarried with *Robert Goodchild*, and was still living. That *Mary*, the third daughter, in 1733, intermarried with the Reverend *Bennet Stevenson*, and died in 1760, leaving issue by him one son, *Bennet Stevenson*, who was still living and unmarried; and two daughters, namely, *Susannah*, who died in 1769 without issue, and *Elizabeth*, who was still living. That the said *John Lacy* of *Lincoln's Inn*, the eldest son of *John* and *Susannah*, being, on the 16th of *April* 1748, seised in fee of the chambers and premises in the declaration mentioned, and possessed of a considerable personal estate, and also entitled to the interest of the said sum of 10,000 *l.* and to the rents and profits of the lands therewith directed to be purchased, by virtue of the said settlement of the 3d of *April* 1688, and the said act of Parliament, made his will in writing, duly attested to pass real estates, and did thereby devise as follows; that is to say, " I *John Lacy* of *Lincoln's Inn*, in the county of *Middlesex*, finding within myself frequent notices of mortality, and not knowing how speedily, suddenly, or in what manner I may come to my end, and being now in perfect health, mind and memory, do make this my last will and testament, with my own hand, as follows; I give, devise and bequeath all my real and personal estate, of what nature or kind soever, or wheresoever it be, unto my dear and well beloved friend *Mrs. Frances Harwood*, now of *Maiden Lane*, in the parish of *Covent Garden*,
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“ Westminster, and her heirs, executors, administrators and assigns for ever; desiring her, and accordingly it is my will, that she pay the following gifts and legacies: To my niece, *Ann Biscoe*, the sum of 100 *l.* within six calendar months after my decease; to Mr. *John Westley*, of the *Temple*, attorney at law, 10 *l.*; to *Jonathan Wells*, Esq; 10 *l.* (these for mourning); to my servant *William Clegg*, if living with me at the time of my death, 20 *l.* over and above what may be due and owing to him; and I likewise, in that case, give him all my linen and woollen apparel (I mean apparel only); and to the maid who may be living with me at *Iver*, two guineas. And I do hereby constitute and appoint the said Mrs. *Frances Harwood* to be the sole executrix of this my last will and testament, revoking all others by me heretofore made: In witness whereof, I have hereunto set my hand and seal, the 16th day of *April*, in the year of our Lord 1748.” That in the summer of 1756, the said *John Lacy* of *Lincoln's Inn*, being in like manner seised in fee of the chambers and premises in the said declaration mentioned, and also possessed of a considerable personal estate, and likewise entitled to the interest of the said sum of 10,000 *l.* and to the rents and profits of the lands and tenements therewith directed to be purchased, by virtue of the said settlement of the 3d of *April* 1688, and the said act of Parliament; did make, and duly publish another will and testament in writing, in the presence of three subscribing witnesses, who duly attested the same. That the disposition made by the said *John Lacy*, by the said will of the year 1756, was different from the disposition in the said will of 1748, *but in what particulars was unknown to the jurors*; but they did not find that the testator cancelled his said will of the year 1756, or that the defendant destroyed the same; but what was become of the said will, the jurors were altogether ignorant. That the said testator *John Lacy* died in *June* 1767, seised in fee of the said premises in the declaration mentioned, without issue, and was never married. And that the said *Elizabeth*, the wife of the said *William Rolfe*, the lessor of the plaintiff, was the niece and heiress at law of the said testator *John Lacy*. And upon these facts, the jury submitted the matter of law to the opinion of the Court.

The question upon this verdict was, whether the devise in the will of 1748, to the defendant, was revoked by the will found to be executed in 1756?

In *Easter* and *Trinity* Terms 1773, this special verdict was argued in the Court of Common Pleas; and in *Hilary* Term 1774, judgment was given for the lessors of the plaintiff, by three of the judges of that Court, against the opinion of Mr. Justice *Blackstone*.

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Upon this judgment the defendant, in the same term, brought her writ of error in the Court of King's Bench; when the Court being unanimously of opinion, that the devise to the defendant, in the will of 1748, did not appear to be revoked by the will in 1756, reversed the judgment of the Court of Common Pleas: Whereupon the lessors of the plaintiff brought their writ of error in Parliament, in order to reverse the judgment of the Court of King's Bench.

On the part of the plaintiff it was argued, that the title of the heir at law being a clear, substantive, independent title, ought not to be defeated, but by a title equally clear and unexceptionable. That the title of a devisee, must be founded on that which is clearly known to be the *ultimate intention* of the testator; and it is not sufficient that the testator did at one time of his life mean to give his estate to the plaintiff, unless he continued in that intention to the time of his death. The jurors had found by the special verdict, that in the summer of the year 1756, Mr. *Lacy* being in like manner as he was at the time of making his first will in 1748, seised in fee of the chambers and premises in the declaration in ejectment mentioned, and possessed of a considerable personal estate, and entitled also to the interest of the 10,000*l.* (which were the same estates that he was found seised and possessed of in the year 1748,) did make, and duly publish another will, duly attested by three witnesses, and executed according to law; and they then added, *that the disposition made by the said John Lacy, by his said will of 1756, was different from the disposition by the said will of 1748.* From whence it appeared, that the disposition thereby intended to be described by the jury, referred to the antecedent estates by them before particularised, as the objects under their consideration; namely, the chambers in the declaration mentioned, and the other estates before specified, being the very same estates disposed of by the said will of 1748; and which the jury, by the verdict, found Mr. *Lacy* to have differently disposed of by his said will of 1756. The finding was a general

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general one; and though the jury said they were unable to ascertain the particulars, yet the finding necessarily imported, that they had received *sufficient satisfaction* as to the *general* contents, to enable them, upon their oaths, to find *that*. From whence the Court must see, that the testator's intention was *generally changed*, and consequently, that the will of 1748 was revoked; and that though he had, by his will of 1748, disposed of the whole bulk of his fortune, consisting of the several estates before specified, to the defendant Mrs. *Harwood*, yet he did, by his will of 1756, dispose of them in a *different* manner. That the jury having found, that Mr. *Lacy* did, in 1756, duly execute another will, the same must be taken to subsist at the time of his death, unless a *subsequent change of intention* had appeared. But the jury had excluded the idea of any such change, by declaring, that they did not find that the testator had cancelled his said will of 1756; and as the jury had not found it cancelled, the Court could not say it was so. By establishing then the first will, which the testator *did not mean to die with*, it would necessarily follow, that the whole of the testator's large fortune *would go from his family, to a person for whom, from 1756, he never intended it*. Wills disinheriting natural heirs, in favour of persons who are strangers in blood, ought not to receive more countenance than the necessity of the case requires: And whenever there is evidence of a change of intention in the testator, such wills can never be established to the prejudice of the title of an heir. That it being at least rendered doubtful, by the execution of the second will, whether the defendant was entitled to *any thing*, or if she was, *what* she was entitled to, it became necessary for her, as claiming under a derivative, and not an original title, to produce the second will, and shew her interest under it. That if ever it should be understood as established law, that from the bare non-production of a latter will, to whatever cause it might be owing, a former will must at all events be established; it would be an opening to frauds of the most dangerous kind, and be the strongest temptation to devisees in a former will, to exert every artifice to get possession of, and suppress the latter instrument, in order to set up the former revoked will. That the statute of frauds having made a certain solemnity necessary in a will of lands, namely, that it shall be attested by three witnesses, and which is neither necessary or usual in other wills; it must be understood, that Mr. *Lacy*, a gentleman of eminence in the law, well knew, that

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that to pass real estate three witnesses were required; but of no use, and totally unnecessary, where no real estate was intended to be devised; and he having adopted that mode of devising, the second will must therefore be taken to be a will of real estate, and consequently to include his chambers in *Lincoln's Inn*. That the case of *Hitchins v. Bassett*,* relative to the two wills of Sir Henry Killegrew, which was relied upon in the Courts below, was so far from being a case against the title of the present plaintiff, that the sole grounds on which that case was decided, made it, on the contrary, a case in the plaintiff's favour. For those grounds were, that there was no proof of any change of intention whatsoever in the testator; or that the second will was a will in any way relating to or affecting his lands, or that it might not be a confirmation of the former will; the jury having there found, that what were the contents or import of the second will, they were *totally ignorant*; they had nothing to lead them to the least guess, what the contents of the second will were. But in the present case, the jury were so far from being *totally ignorant* of the contents of the second will, that they were enabled to find, and did find, that Mr. Lacy's disposition in 1756, was *different* from what it was in 1748. That it concerned lands, was sufficiently found from the mode of devising; and that it extended to the real estate in question, was inferred from his having no other estate which required the solemnity of the statute of frauds.

* Shower's
Parl. Cases
146. by the
name of Hun-
gerford v.
Basset.

On the other side it was said, that with regard to the doctrine of revocations of wills, it seems agreed, that the determination of the House of Lords, in the case of *Hitchins v. Bassett*, has settled this point as law; viz. that a subsequent, substantive, independent will of lands, is not, in its own nature, a revocation of a former will, nor will operate as such, unless it contains words expressly revoking the former, or makes a different and incompatible disposition of the same lands. In the present case, the will of 1756 was not to be found; its contents were not known; therefore no express revocation of the former will appeared in it; nor could it be shewn, that it contained any different or incompatible disposition of the chambers now in question.

A Wedder-
burn.
J. Wallace.
C. Fearne.

But it is objected, that it was found by the verdict, that the disposition made by the latter will, was different from that made

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by the former. To this it was answered, that it was at the same time found to be unknown, *in what particulars* that difference consisted; whether it related to lands, or to personal estate only; to the appointment of an executor, or to the *quantum* of a legacy. The most trivial alteration in the most inconsiderable legacy, might have occasioned that difference; but there was nothing to prove, that it extended to those particular chambers, which were the subject of the present question. The mere existence of a subsequent will, is not of itself a revocation; nor is any new disposition contained therein, a revocation of the former devise of the chambers in question, unless that new disposition affects those very chambers. And therefore, until it could be shewn, that the different disposition found by the verdict extended to those chambers, or that there were express words of revocation of the former will contained in the latter, the devise under which the defendant claimed, stood unrevoked by any thing which could be shewn; and to say it is revoked, but it cannot be shewn by what, sounds repugnant to common sense.

It is however urged on behalf of the plaintiff, that her claim is that of an heir at law, which is always favoured in our Courts of Justice. But the rule respecting the favour shewn to an heir at law is, *that he shall not be disinherited, otherwise than by express words, or necessary implication*. Now in the present case, there is found an express devise to the defendant in the will of 1748, which takes this case entirely out of the application of the rule now mentioned. The question here is not, whether the claim of a devisee, under a doubtful, uncertain disposition, shall be supported against the hereditary title of an heir at law; but whether a clear and express devise in a will, solemnly and duly executed, and forthcoming, is to be revoked by a *conjecture*, that the unknown contents of an unexisting will did import some unknown disposition, to some unknown person, of chambers, which it is unknown whether that will had any sort of relation to, or not.

But it is still further objected, that the claim of a devisee must be founded on the *last* will of the testator; and that in this case there being found to be a will executed subsequent to that in 1748, the will of 1748 was not the *last* will of the testator, and consequently nobody could claim any lands under it.

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The proposition, that the claim of a devisee must be founded on the *last* will of a testator, is fallacious, unless its import be very strictly attended to; it is true, the will under which a devisee claims must be the last will, in respect to the very lands which are the subject of such claim; but if there be ten subsequent wills, which contain no express revocation of the former will, nor any words which can affect or extend to the subject matter of a devise contained in such former will, that former will, *quoad* the subject of such devise, is the *last* will of the testator. Now though, in the present case, another will was found to have been executed subsequent to that of 1748, under which the defendant claimed; yet there was no kind of evidence of any express revocation, or of any disposition whatsoever, either express or implied, in that subsequent will, relative to, or affecting the chambers in question. Therefore, for any thing which could be shewn to the contrary, the will of 1748, under which the defendant claimed, was really, so far as respected the subject of her claim, the *last* will of the testator. Besides, a will has no operation at all, till after the death of the testator; therefore any will which is not then existing, is, in effect, no will. It did not appear, nor could it be shewn, that the will of 1756 existed at the time of the testator's death, and it is a maxim in law, that *de non apparentibus, et non existentibus, eadem est ratio*.

The circumstances of this case, afforded no ground for any kind of presumption against the defendant; no spoliation was found, no kind of evidence existed of any thing like it; nor were there any facts which led even to a suspicion of it: It was *expressly* not found, that she destroyed the will of 1756; it was not found, that any such will ever came into her possession; and to suppose that it did, would be forming a conclusion against probability. That will either contained a virtual or express revocation of the will under which the defendant claimed, or it did not; if it did, it could not be imagined that the testator would have left it open to the access of a person, to whose prejudice it was to operate; if it did not, then the devisee, was that will in her possession, could not hesitate a moment in removing the present question upon her title, by the immediate production of it. It was not very obvious, upon what principle the will of 1756, could be pronounced a revocation of the devise in that of 1748, whilst that clause of the statute of frauds and perjuries, whereby it is enacted, "that all *devises* and bequests
" of

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“ of lands and tenements, shall remain and continue in force,
 “ until the *same* be burnt, &c. by the devisor, &c. or unless
 “ the *same* be altered by some other will, or codicil in writing,
 “ or other writing of the devisor, &c. *declaring the same*,” stands
 unrepealed. For here was an exprefs devise in the will of 1748,
 which, by the above clause, the Legislature says shall continue
 in force, unless the *same*, namely, that very identical particular
 devise, is altered by some other will, &c. declaring the same.
 Now unless a declaration of this nature was discovered in the
 contents of a will, not one syllable whereof was known, it is
 evident the essential circumstance required by the statute, to ef-
 fect a revocation of the devise in question, was wanting.

Lastly, it was submitted, that should a will which cannot be
 produced, and the contents, purport or effect whereof are en-
 tirely unknown, be construed as a revocation of a known, sub-
 sisting will; such a construction would in effect, not only be
 overthrowing the statute of frauds and perjuries, in respect to
 one of the most material and dangerous species of fraud intended
 to be provided against by that statute; but would, at the same
 time, be striking a most fatal blow at the very root of all testa-
 mentary power over lands; for of what use to a man is the power
 of making a will, if he cannot make that will secure? But
 it is impossible that any will, however deliberately made, and
 solemnly executed, can be in any degree secure, if it may be set
 aside by means so very practicable and easy, as only swearing to
 the execution of an unexisting will, without shewing or prov-
 ing its contents.

Judgment
 affirmed.
 M. S. Jour.
sub anno 1775.
 P. 743.

After hearing counsel on this writ of error, the following
 question was put to the judges; *viz.* “ Whether, on the facts
 “ found by the special verdict in this cause, the devise of the
 “ chambers in *Lincoln's Inn*, to *Frances Harwood*, the defend-
 “ ant in error, by the will of the 16th of *April* 1748, be revoked
 “ ed or not?” Whereupon the Lord Chief Baron of the Court
 of Exchequer (having taken time to consider) delivered the un-
 animous opinion of all the judges of that Court, except Mr. Bar-
 on *Perrott*, who was ill and could not attend, that the said
 devise was not revoked. It was therefore ORDERED, and AD-
 JUDGED, that the judgment given in the Court of King
 Bench

Bench, reversing the judgment given in the Court of Common Pleas, should be affirmed; and that the record should be remitted, &c.

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Between *Robert Hill*, Clerk, Plaintiff,

Goodyer St. John Esq; Defendant,

} in Error. Case 29.

11th May, 1775.

DAME *Mary Broughton Delves*, the widow of *Sir Brian Broughton Delves*, Bart. being seised of the advowson of the church of *Mottisfont*, otherwise *Mottson*, *East Dean* and *Lockerley*, in the county of *Southampton*, on the 2d of *December* 1766, granted and conveyed the same, for a good and valuable consideration, to the defendant *St. John* and his heirs. 2 Black. 930.

In *October* 1772, the advowson became void by the death of the last incumbent, whereupon the defendant tendered his presentation, and the plaintiff *Mr. Hill* also offered himself to be presented, and thereupon *Mr. St. John* issued his *quare impedit* against *Mr. Hill*, and the Bishop of *Winchester*, in whose diocese the advowson lies; and the declaration stated, that *Thomas Fuller*, *John Fuller*, *Frances Fuller*, and *Rose Fuller*; were seised as in gross by itself as of fee and right, and being so seised, presented *Edward Jones* their clerk to the same church being vacant, who was thereupon admitted instituted and inducted; and being so seised, and the said *Edward Jones* being the parson as aforesaid, they, on the 10th of *February* 1764, at *Mottisfont* aforesaid, by their deed duly inrolled, granted the advowson aforesaid to *Sir Brian Broughton Delves*, Bart. and his heirs; whereby the said *Sir Brian* became seised of the said advowson, and being so seised, on the 21st of *May* 1764, duly made his will, and thereby devised the said advowson to *Dame Mary* his wife, and her heirs; and afterwards on the 1st of *February* 1766, the said *Sir Brian* died so seised, and thereupon the said *Dame Mary* became seised of the said advowson, and being so seised, and the church being full of the said *Edward Jones*, the said *Dame Mary*, on the 2d

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of *December* 1766, by her deed in writing, granted the said advowson to the said *Goodyer* and his heirs, whereby he became seised, and being so seised the said church became vacant, by the death of the said *Edward Jones*, and by reason thereof it belonged to the said *Goodyer* to present, but the defendants hindered him, whereby, &c.

To this declaration the said *Robert Hill* pleaded, that true it is, that the said *Fullers* were seised of the said advowson as aforesaid, and being so seised, presented *Edward Jones*, who was admitted, instituted and inducted, and that the said *Edward Jones* being the parson, they granted the advowson to the said *Sir Brian* and his heirs, and that the said *Sir Brian* was thereby seised of the said advowson as of fee, and died so seised, as set forth in the declaration; but the said *Robert* says, that upon the death of *Sir Brian*, the advowson descended to his brother, (then *Thomas Delves*, Esq;) now *Sir Thomas Broughton*, Bart. as heir of *Sir Brian*, who thereby became seised, and being so seised, and the church being full of the said *Edward Jones*, *Sir Thomas* on the 6th of *June* 1772, by his deed duly inrolled, granted the said advowson to the said *Robert* and his heirs; by virtue whereof the said *Robert* became seised, and being so seised, the church became vacant by the death of the said *Edward Jones*, whereupon the said *Robert* petitioned the Bishop to admit and institute him, (he the said *Robert* being patron of the said advowson, and a Clerk in holy orders) and the said *Robert* claimed to be admitted. And he traversed, that the said *Sir Brian* devised the said advowson to the said *Dame Mary*, upon which fact issue was taken.

The cause came on to be tried at *Winchester* Assizes in 1773, when the jury found the following special verdict; viz.

That on the 13th of *June* 1763, by articles of agreement, sealed with the seals of *Sir Thomas Gatehouse*, Knt. and *Sir Brian Broughton Delves*, Bart. and made between the said *Sir Thomas Gatehouse*, Knt. on behalf of the executors of *Maynard Guerin*, Esq; and those of his late father, of the one part, and *Sir Brian Broughton Delves*, Bart. of the other part, in consideration of 1 l. 1 s. to the said *Sir Thomas Gatehouse* paid, as earnest by the said *Sir Brian*, and in consideration of 9998 l. 19 s. to be paid in manner

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maner therein mentioned, the said Sir *Thomas Gatehouse* covenanted and agreed with the said Sir *Brian*, his heirs and assigns, that they the said executors and trustees should on or before the 25th day of *March* 1764, grant and convey unto the said Sir *Brian* and his heirs, an estate of inheritance in fee simple of and in the manor of *Upper Clatford*, in the county of *Hants*, with the lands, tenements, hereditaments, and appurtenances thereunto belonging, or reputed as parcel thereof, and also certain other lands therein mentioned, in the said county of *Hants*. And the said Sir *Brian* thereby covenanted to pay the said purchase money, on or before the said 25th day of *March* 1764.—That on the 30th of *October* 1763, by other articles of agreement, made between the Honourable *Thomas Pitt*, of the one part, and the said Sir *Brian Broughton Delves*, of the other part; the said *Thomas Pitt*, in consideration of the sum of 7000 *l.* to him paid, and of the further sum of 17,000 *l.* to be paid him by the said Sir *Brian*, pursuant to a covenant therein contained, did for himself and his heirs, covenant with the said Sir *Brian*, that he the said *Thomas Pitt*, or his heirs, would on or before the 25th day of *March* then next, grant and convey unto the said Sir *Brian* and his heirs, all that the manor or lordship of *Abbots Ann*, alias *Abbas Ann*, in the county of *Southampton*, with the appurtenances; also the scite, capital messuage, farm and demesne lands of the said manor, situate in *Abbots Ann*, alias *Abbas Ann* aforesaid, and *Little Ann*, or one of them, in the said county of *Southampton*; and also the advowson, donation and right of presentation of, in and to the rectory and parish church of *Abbots Ann*, alias *Abbas Ann*, and *Little Ann*, together with the several messuages, cottages, farms, lands, hereditaments and appurtenances to the said manor or manors belonging, and all other his lands, tenements and hereditaments at *Abbots Ann* and *Little Ann* aforesaid.—That on the 10th day of *February* 1764, the said *Thomas Fuller*, *John Fuller*, *Frances Fuller* and *Rose Fuller*, being seised in fee of the advowson of the church of *Mottisfont*, alias *Mottson*, *East Dean* and *Lockerley*, by their deed in writing, made between them the said *Thomas Fuller*, *John Fuller*, *Frances Fuller* and *Rose Fuller*, of the one part, and the said Sir *Brian*, of the other part; in consideration of 500 *l.* then paid to them the said *Thomas Fuller*, *John Fuller*, *Frances Fuller* and *Rose Fuller*, by the said Sir *Brian*, granted, bargained, sold, released and conveyed to the said Sir *Brian*, his heirs

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heirs and assigns, all that the said advowson, donation, right of patronage, presentation, and free disposition of the rectory and parish church of *Mottisfont*, alias *Mottson*, *East Dean* and *Lockerley*, in the said county of *Southampton*, and all glebe lands, tithes, tenths, oblations, obventions, hereditaments and appurtenances whatsoever, to the said rectory belonging and appertaining; to hold to the said Sir *Brian*, his heirs and assigns for ever.—That the said Sir *Brian* being seised in fee of the advowson of the church of *Mottisfont*, alias *Mottson*, *East Dean* and *Lockerley* aforesaid, by virtue of the said grant and conveyance thereof; and he being entitled in Equity, under the said several articles, to the respective premises therein mentioned, and thereby agreed to be purchased by and conveyed to him, and which articles remained to be carried into execution; and being seised in fee of divers manors, messuages, lands, tenements and hereditaments, in the county of *Stafford*, and of certain copyhold messuages, lands, and hereditaments of inheritance, in the county of *Suffolk*, and of a small freehold estate of inheritance, in the county of *Salop*; and being seised for his life, by virtue of the articles made on his intermarriage with Dame *Mary* his wife, bearing date the 30th day of *August* 1762, of and in divers manors, lands, tenements and hereditaments, in the county of *Chester*, with remainder to his first and other sons by the said Dame *Mary* his wife, successively in tail male (subject to a rent charge of 1000 *l.* by way of jointure, for the said Dame *Mary* for her life, and also to another rent charge of 1000 *l.* by way of jointure to the mother of the said Sir *Brian* for her life) with the reversion to himself in fee; and the said Sir *Brian* being seised of a real estate in the county of *Lincoln*, which he had by articles, bearing date the 10th day of *November* 1763, agreed to sell and convey to *George Foster Tuffnell*, Esq; in consideration of 27,000 *l.* which was to be paid on completing the said purchase; did, on the 21st day of *May* 1764, duly make, execute and publish his last will and testament in writing, in the presence of and attested by three witnesses, in the presence of the said Sir *Brian*, in the words following: “ This is the last will and testament of me, Sir *Brian Broughton Delves*, of *Broughton* in the county of *Stafford*, Bart. of which will, I have caused two parts to be written, both of the same tenor, words and form. I give, devise and bequeath unto my wife, Lady *Mary Delves*, her heirs, executors and administrators respectively, all that my dwelling

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“dwelling house situate in *Upper Brook Street*, near *Grosvenor*
 “*Square*, in the county of *Middlesex*, with all and every the
 “appurtenances, and also all such share and interest, as at the
 “time of my decease I shall be possessed of, or entitled to in the
 “public stocks or funds, and also all and singular my jewels,
 “trinkets, plate, linen, pictures, china, household goods and
 “furniture whatsoever, and all my horses of every kind, and
 “such three of my carriages as my wife shall choose, and all my
 “estate, right, title and interest, in and to the same respec-
 “tively; to hold the same unto my said wife *Lady Mary Delves*,
 “her heirs, executors and administrators respectively, to and for
 “her and their own proper use and benefit. Also I give, devise
 “and bequeath unto my said wife and her heirs, to and for her
 “and their own proper use and benefit, *all the manors, mes-*
 “*suages, advowsons, farms, lands, tenements, hereditaments and*
 “*real estate whatsoever, situate and being in the county of Hants,*
 “*for the purchase whereof I have already contracted and agreed,*
 “*with all and every of the appurtenances, and all my right, title*
 “*and interest in and to the same; or in lieu thereof, the whole money*
 “*arising from or by the sale of all my real estates in the county of*
 “*Lincoln, and such further sum and sums of money, as together*
 “*with the money arising by such sale, shall be sufficient to enable*
 “*my said wife or her heirs, to compleat the several contracts I*
 “*have made as aforesaid, for the purchase of the said estate and*
 “*premises in the county of Hants; in trust nevertheless to compleat*
 “*such purchases, and to procure and take conveyances of the same*
 “*estates in the county of Hants, to her and their own proper use*
 “*and benefit.* Also I give and devise unto *Edward Knyaston*, of
 “*Hardwick*, in the county of *Salop*, Esq; and *John Chambre*,
 “of *Petton*, in the same county, Esq; and their heirs and
 “assigns, all and singular my manors, messuages, advowsons,
 “farms, lands, tenements, tithes, hereditaments and real estate
 “whatsoever, situate, arising and being in the counties of
 “*Stafford* and *Chester*, or either of them, and all my estate,
 “right, title and interest in and to the same; to hold the same
 “unto the said *Edward Knyaston* and *John Chambre*, their heirs
 “and assigns, to and for the several uses, intents and purposes
 “herein after declared or expressed concerning the same pre-
 “mises; (that is to say) to the use, intent and purpose, that
 “*Charles Shrimpton*, of *Upper Clatford*, in the county of *Hants*,
 “and his assigns, shall and may have, receive and take, for and
 “during

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“ during the term of his natural life, one rent charge or yearly
 “ sum of 20 *l.* of lawful money of *Great Britain*, to be issuing
 “ out of the said last mentioned premises, free and clear of and
 “ from all Parliamentary and other taxes, and all deductions and
 “ abatements whatsoever, and to be paid quarterly at the four most
 “ usual feasts or days of payment in the year, (that is to say) the
 “ Feast of *St. Michael the Archangel*, the birth of our Lord
 “ *Christ*, the Annunciation of the Blessed Virgin *Mary*, and
 “ the Nativity of *St. John the Baptist*, by even and equal por-
 “ tions; the first payment thereof to begin and be made on such
 “ of the said feasts, as shall first and next happen after my decease;
 “ and to this further use, intent and purpose, that so often as
 “ the said rent charge, or yearly sum of 20 *l.* shall happen to be
 “ behind and unpaid, in part or in all, by the space of 21 days
 “ next after any of the said feast days, whereon the same ought
 “ to be paid as aforesaid, that then and so often, and from time
 “ to time it shall and may be lawful, to and for the said *Charles*
 “ *Shrimpton*, and his assigns, into and upon the said premises, out
 “ of which the said rent is to be issuing as aforesaid, or any part
 “ thereof, to enter and distrain, and the distress and distresses then
 “ and there found, to take, lead, drive, carry away and impound,
 “ and in pound to detain and keep, and otherwise to demean
 “ therein according to law, until the said rent charge, or such
 “ part thereof as shall be then in arrear, and all costs and charges
 “ sustained by reason of the non-payment thereof, shall be fully
 “ satisfied and paid. And, subject to the said rent charge or yearly
 “ sum of 20 *l.* to the use and behoof of my brother *Thomas Del-*
 “ *ves*, Esq; and his assigns, for and during the term of his na-
 “ tural life; and from and after the determination of that estate,
 “ by forfeiture or otherwise, to the use and behoof of the said
 “ *Edward Kynaston* and *John Chambre*, and their heirs, for and
 “ during the natural life of my said brother, in trust by the
 “ usual ways and means, to preserve the contingent uses and re-
 “ mainders herein after limited, from being defeated; but ne-
 “ vertheless, to permit and suffer my said brother and his assigns,
 “ to receive and take the rents, issues and profits of the same
 “ premises, to his and their own use during his life; and from
 “ and after his decease, to the use and behoof of the 1st, 2d,
 “ 3d, 4th, 5th, and all and every other the son and sons of the
 “ body of my said brother, lawfully begotten, severally and suc-
 “ cessively in remainder, one after another, as they shall happen

“ to be in priority of birth and seniority of age ; and the several
 “ and respective heirs male of the body and bodies of all and every
 “ such son and sons lawfully issuing, so as that the elder of such
 “ sons, and the heirs male of his body, shall be always preferred,
 “ and take before the younger of the same sons, and the heirs
 “ male of his and their respective body and bodies ; and for de-
 “ fault of such issue, to the use and behoof of my cousin *John*
 “ *Broughton*, late major and commandant of his Majesty’s one
 “ hundredth regiment of foot, his heirs and assigns for ever ;
 “ and to and for no other use, intent or purpose whatsoever.
 “ Provided always, and my will is, and I do hereby declare, that
 “ it shall and may be lawful to and for my said brother, to make
 “ such lease or leases of the said premises so limited in use to
 “ him for his life as aforesaid, or any part thereof, as tenants in
 “ tail, by virtue of and under a statute made and passed in the 32d
 “ year of King *Henry VIII.* are enabled to make ; and also to
 “ make such jointure and provision for any wife and children,
 “ as he in his discretion shall think fit. Provided also, and I
 “ do hereby further declare my will to be, that my said brother,
 “ and the heirs male of his body, shall, from and after my de-
 “ cease, assume, take and use the surname of *Broughton* only, and
 “ no other surname, and totally relinquish the surname of *Delves* ;
 “ and shall use his utmost endeavours as soon as conveniently
 “ may be after my decease, to obtain an act of Parliament for
 “ that purpose ; or on neglect thereof, by the space of two
 “ whole years next after my decease, my said manors, messuages,
 “ advowsons, farms, lands, tenements, tithes and hereditaments,
 “ so limited in use to my said brother for his life, as aforesaid,
 “ shall go, remain and be to the use of such person or persons,
 “ for such estate and estates, and in such manner as by virtue of
 “ the limitations herein before contained, the same would go and
 “ remain, in case my said brother was then naturally dead. Also,
 “ I give and bequeath unto my said cousin, Major *John Brough-*
 “ *ton*, the sum of 3000 *l.* and to my brother-in-law *Noel Hill*,
 “ Esq; as a testimony of the great regard and friendship I have
 “ for him, the sum of 2000 *l.* and also all such sum and sums of
 “ money as he shall or may owe to me at the time of my de-
 “ cease. Also I give and bequeath unto such of my servants as
 “ shall live with me at the time of my decease, the sum of 20 *l.*
 “ apiece over and above the wages which shall then be due to
 “ them respectively ; and all the rest, residue and remainder of
 “ my

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“ my goods, chattels and personal estate, whatsoever and where-
 “ soever (after and subject to the payment of my just debts and
 “ funeral expences), I give and bequeath to my said brother
 “ *Thomas Delves*, his executors, administrators and assigns, to
 “ and for his and their own proper use and benefit. And I do
 “ hereby nominate, constitute and appoint the said *Edward*
 “ *Kynaston* and *John Chambre*, executors of this my last will and
 “ testament, and desire their acceptance of the sum of 100*l.* a
 “ piece for their trouble. And lastly, hereby revoking all for-
 “ mer and other wills by me at any time heretofore made, I de-
 “ clare this to be my last will and testament.”

That at the time of making the said will, the said several ar-
 ticles of the 13th of *June*, and the 30th of *October* 1763, were
 in force, and remained to be carried into execution. And that
 since the death of the said Sir *Brian*, the respective premises com-
 prised in the said articles, had been conveyed to or in trust for the
 said Dame *Mary* his widow, and her heirs, in consequence of the
 said will. That the said Sir *Brian* was not, when he made and
 executed his said will, seised of any advowson, tenement or he-
 reditament in the said county of *Southampton*, except the said
 advowson of the said church of *Mottisfont*, alias *Mottson*, *East*
Dean and *Lockerley*, and the premises comprised in the said con-
 veyance of the 10th of *February* 1764; nor had he, at the time
 of making his said will, contracted or agreed for the purchase of
 any manor, messuage, advowson, farm, land, tenement or here-
 ditament in the said county of *Southampton*, which rested in
 contract, and remained uncompleted, other than and except
 those manors, hereditaments, and premises, respectively men-
 tioned in the said several articles of the 13th of *June* 1763,
 and the 30th of *October* 1763. That the said Sir *Brian* was not
 at the time of making his said will, seised of or entitled to any
 advowson or advowsons, or right of presentation in the counties
 of *Chester* and *Stafford*, or in either of them, but only to the
 nomination of a minister or curate for the time being, of or to
 the chapel of *Broughton*, in the parish of *Eccleshall* in the said
 county of *Stafford*. That afterwards (to wit) on the 1st of *Fe-*
bruary 1766, the said Sir *Brian*, being of the age of 25 years,
 died without revoking or altering his said will, and without issue;
 and that *Thomas Delves*, named in the said will, now Sir *Thomas*
Broughton, Bart. was, and is, the only brother and heir at law of

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the said Sir *Brian Broughton Delves*, and as such, the said respective premises, in the counties of *Suffolk* and *Salop*, descended to him the said Sir *Thomas*, who was a minor of the age of 20 years, at his said brother's death; and at the death of the said Sir *Brian*, the said Dame *Mary*, his widow, was of the age of 24 years, or thereabouts. That upon the 6th of *June* 1772, the said Sir *Thomas Broughton*, by indenture of bargain and sale by him duly executed, and inrolled in Chancery, in consideration of the sum of 3825*l.* to him paid by the said *Robert Hill*, granted, bargained and sold to the said *Robert Hill* and his heirs, the said advowson of the church of *Mottisfont*, alias *Mottson*, *East Dean* and *Lockerley*, and all glebe lands, tithes, tenths, oblations, obventions, hereditaments and appurtenances thereunto belonging. But whether the said Sir *Brian* did, by his said will, devise to the said Dame *Mary* his wife, the said advowson of the church of *Mottisfont*, alias *Mottson*, *East Dean* and *Lockerley*, or not, the jurors were totally ignorant; and therefore they prayed the advice and consideration of the Court, &c.

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In *Michaelmas* Term 1773, this case was argued in the Court of Common Pleas, and the Court gave judgment for the defendant; viz. that Sir *Brian* did not, by his will, devise the advowson in question to Dame *Mary* his wife.

The defendant therefore, brought his writ of error in the Court of King's Bench; and after the case had been twice argued there, the Court, in *Trinity* Term 1774, unanimously reversed the judgment of the Court of Common Pleas; and were of opinion, that Sir *Brian* did, by his will, devise the said advowson to Dame *Mary*.

To reverse this latter judgment, Mr. *Hill* brought a writ of error in parliament; and on his behalf it was argued, that the advowson of *Mottisfont* did not rest in contract, at the time Sir *Brian* made his will; for he had made a compleat purchase of this advowson, and taken a conveyance of it to himself in fee, three months before. It could not therefore, come within the description of all the manors, messuages, advowsons, &c. for the purchase whereof I have already contracted; unless a purchase already compleated, means the same thing as a purchase contracted for. No sort of contract or agreement whatsoever appeared,

E. Thurlow.
J. Dunning.
C. Fearne.

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respecting the purchase of the advowson of *Mottisfont*; and if any ever existed previous to the conveyance, it became extinguished in the completion of it, before the will was made. A contract is a thing in its nature *executory*; when *executed*, its very essence is at an end. It would be impossible to extend the words "estate, &c." for the *purchase whereof* I have *already contracted*, to an estate *actually purchased* and conveyed, at however short a time, before the making of the will, without at the same time admitting, that the same words would be sufficient to include all the lands, which the oldest testator who ever lived, had purchased from the earliest period of his life; for no line can in this respect be drawn between three months, and threescore years. The resting in contract, is a circumstance of description, which ceases to be applicable to an estate, in the very instant when the purchase is completed, or else continues applicable for ever.

But it was objected, that the clause which was the subject of the present question, might be considered as containing two several descriptions: The first imported in the words, "all the manors, messuages, advowsons, &c. in the county of *Hants*:" And the other in the words, "for the purchase whereof I have already contracted, &c." That these two descriptions might be taken separately, and when so taken, the first contained words sufficient to comprise the advowson in question; and that the latter words were not necessarily restrictive of the former, but might be considered as an additional description.

To this it was answered, that it was impossible to distinguish two several descriptions in the clause in question. The words, "all the manors, messuages, advowsons, &c. in the county of *Hants*," served, of themselves, to ascertain no lands whatsoever of the testator. The word *the* in the beginning of the clause, must have an immediate and indispensable relation to the word *whereof*, and those following it in the latter part of the clause, to compleat the sense, and make a description; without the latter words, the sense was manifestly suspended and imperfect; the parties therefore were not at liberty to separate the former from them, and consider the latter, only as a farther description of a thing sufficiently ascertained before. The whole clause contained but one description, of which the latter words made an essential part. But nothing, it was presumed, could more decisively

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fix the construction of the devise in question, than that clause in the will, which immediately followed it; wherein the testator, after he had before said, "I give, devise, &c. unto my wife and her heirs, all the manors, &c. in the county of *Hants*, for the purchase whereof I have already contracted," added, "or in lieu thereof, the whole money arising from the sale of all my real estates in the county of *Lincoln*, and such further sum and sums of money, as, together with the money arising from such sale, shall be sufficient to enable my said wife and her heirs, to compleat the several contracts I have made as aforesaid, for the purchase of the said estate and premises in the county of *Hants*." Here was an express devise of estates, for the purchase whereof the testator had already contracted, or in lieu thereof, so much money as would be sufficient to compleat the contracts which he had made for the purchase of the said estates; these said estates must therefore necessarily be estates, for the purchase whereof contracts were then subsisting, which had not been compleated, but might be so, by the testator's wife or her heirs; for the money requisite to compleat such contracts, was the express measure of the satisfaction given in lieu of the said estates, and such money was expressly given, to enable the testator's wife or her heirs to compleat such contracts. It was therefore manifest, that the compensation for these estates, related and extended only to estates, the purchases whereof remained to be compleated, and was totally inapplicable to any other. Besides, the subsequent direction in the will, for Lady *Broughton* and her heirs, to procure and take conveyances of the same estates, to her and their own use, excluded the idea of any estate which had already been conveyed to the testator himself; any such estate could never have been the object of this direction, and consequently could not be one of those same estates to which the direction referred. Indeed, it seemed to require some stretch of apprehension, to conceive upon what ground a devise of estates, under the express description of estates for the purchase whereof the testator had already contracted, followed by a gift of so much money as should be necessary to compleat the contracts, and to procure and take conveyances of the same estates, could be supposed to extend, or have any kind of relation to an estate, concerning which no contract of any sort was subsisting, for which no money was due to compleat the purchase, and of which no conveyance remained to be procured or taken; but which had been before compleatly purchased by, and conveyed to

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to the testator himself, and was, at the time of making his will, vested in him, as finally and effectually as any estate ever was, or could be vested in any man.

It was however contended on the other side, that the word *advowsons*, in the plural number, was an indication of the testator's intent to pass *more* than *one* advowson; and therefore, as he had only one advowson in the county of *Hants*, namely, the advowson of *Abbots Ann*, besides the advowson of *Mottisfont*, he must have intended to comprise the advowson of *Mottisfont* in that devise, there being no other way of satisfying the plural expression so used.

But to this it was answered, that any inference respecting the testator's particular intention of passing more than one advowson, by his using the word *advowsons*, in the plural number, was entirely precluded by his using the very same plural expression in a few lines afterwards, and in a place where it was evident he could have no particular intent to pass any advowson at all; for in the clause, whereby he devised his estates in the counties of *Stafford* and *Chester*, to trustees, &c. he used the word *advowsons* in the plural number, although it appeared by the special verdict, that he had no advowson at all in either of those counties; it followed therefore, that he could have no particular intent in this instance, to pass even one advowson, and much less two or more. In both these clauses, the plural expression appears to have been used as a word of course, by the person who penned the will; without any particular design, or regard to the number or plurality of the objects of such expression, but only from a general intention of comprehending all estates, which might answer the several descriptions contained in those respective clauses.

But it was still further objected, that a testator's intention must be collected from all parts of his will, compared together; and that upon the general face of the will, in this case, the testator seems to have intended a sort of provincial distribution of his estates; *viz.* that those in the counties of *Stafford* and *Chester* should go one way, and those in the county of *Hants* another; and that it was not to be supposed, that he intended to separate so small a part as the advowson of *Mottisfont*, from the residue of his estates in the county of *Hants*; and therefore it must be con-

cluded, that it was his intention to comprise the advowson of *Mottisfont* in the devise in question.

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In answer to this it was said, that the rule that a testator's intention must be collected from all the parts of his will compared together, supposes that the intention so to be collected, has a necessary connection with some part of the will or other; but no rule of law or construction says, that a Court of Justice is to make a man's will, or suppose an intention in the testator, which is not necessarily connected with any part of his will. There was not a syllable in Sir *Brian*'s will, which expressed or implied any intention at all respecting the advowson of *Mottisfont*, unless a disposition of the whole of his estates in the counties of *Stafford* and *Chester*, to one person, was to be deemed inconsistent with a disposition of only part of his estates in the county of *Hants* to another person; or unless it is to be inferred, that because a testator has devised the greatest part of his lands in a certain county, (and that too in terms expressly restraining the devise to such part only) he therefore intended the devisee to have the whole of his real property in the same county; but it was presumed, a conclusion of this nature would differ very little from *making*, or rather *altering* a testator's will. It must amount at least to an introduction of *some addition* to that will, inasmuch as it would operate to dispose of lands which the testator had left undisposed of; but a claim to the advowson of *Mottisfont* under Sir *Brian*'s will, must rest upon something expressed or implied in that will, as made by Sir *Brian* himself. It must be observed also, that the advowson in question, and the estates contracted for, were purchased at different times, and from different persons, and had no connection in title with each other.

Lastly, There was no room in this case, even for the common presumption, that a testator intends not to die intestate as to any part of his estate; for it appeared, that Sir *Brian* actually died intestate, as to his estates in the counties of *Suffolk* and *Salop*, which he left unnoticed by his will, and which therefore, upon his decease, descended (as was found by the verdict) to his brother and heir at law, Sir *Thomas Broughton*. Now there was no more mention or disposition of the advowson of *Mottisfont*, in any part of Sir *Brian*'s will, than there was of the estates in *Suffolk* and *Salop*; nor was there a liberty of supplying a disposition in

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one case, any more than in the other ; any attempt of this nature must proceed upon mere conjecture ; but it is not the policy of our laws, to suffer any person's will to be made by another man's conjecture. Every testamentary disposition of lands must proceed from the testator himself, he must act a part in the business, and a decided part too ; either by declaring his intention to dispose in *express terms*, or by something *necessarily importing* such an intention ; for nothing less operative can supersede or affect the right of an heir at law,

A. Wedderburn.
J. Mansfield.

On behalf of the defendant in error it was contended, that the advowson in question was expressly devised to the testator's wife, in the following words of the will: " Also, I give, devise, and " bequeath unto my said wife, and her heirs, to and for her and " their own proper use and benefit, *all* the manors, messuages, " *advowsons*, farms, lands, tenements, hereditaments, and real " estates *whatsoever*, situate and being in the county of *Hants*, " for the purchase whereof I have already contracted and agreed." And it appeared by the special verdict, that the advowson in question was in the county of *Hants*, and not only contracted for, but actually conveyed to the testator, before the making of the will. That unless the advowson in question was construed to pass, the word *advowsons*, made use of in the plural number, would have no effect. It appearing by the verdict, that the testator at the time of making his will, had not contracted for any other advowson in *Hampshire*, but the one in question, and the advowson of *Abbots Ann* ; and in the exposition of all instruments, and most particularly of wills, that construction is to be preferred, which gives effect, as far as possible, to every expression found in them.

Several objections, however, are made by the plaintiff in this case. I. That the heir at law ought not to be disinherited by any other than a necessary implication. II. That the words *contracted and agreed for*, do not import an estate already purchased and paid for. III. That if the advowson in question should be construed to pass by the will, an advowson purchased twenty years before, must equally have passed, as there was no drawing the line between the two cases. IV. That the clause in the will immediately following the clause in question, whereby the testator substituted the produce of the *Lincolnshire* estate, in lieu of the estate

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estates before devised, pointed out what estates were before devised; for as the produce of the *Lincolnshire* estate amounted to the exact sum remaining to be paid for the *Hampshire* estates, exclusive of the advowson in question; and as it was reasonable to suppose, that the substituted money was intended to be equivalent to the interest in lieu of which it was given; it must be inferred, that the advowson in question was not intended to pass.

To the first objection it was said, that this advowson passed by the express words of the will, and without any implication.

To the second objection it might be answered, that in the strictest and most proper sense of the words, *contracted and agreed for*, they would include the estates actually purchased, as no estate can be purchased, without being contracted and agreed for; but the better answer was, that the expressions used by a man in his will, are to have that sense put upon them, which plainly answers his intention. Here the testator, having some real property recently contracted for only, and other more recently purchased, made use of general terms, including all, and which could not be satisfied without including all; and then added the words, *for the purchase whereof I have already contracted*, not as distinguishing one from the other, but as applying to all; it appearing clearly to be his intention to dispose of all. The word *already* was a strong proof of this, and clearly shewed, that the testator had in his view, all the real property in *Hampshire*, of which he was then the owner.

As to the third objection, the words of the will were abundantly sufficient to have passed the advowson in question, though it had been purchased twenty years before; but the cases were very different; for it appeared, that the purchase of the advowson in question, was subsequent to all the other contracts, and made between the time of entering into those contracts, and the time appointed for completing them; and which manifestly distinguished the case, from that of an advowson purchased long before.

In answer to the fourth objection, it was said, that there was no occasion for any equivalent to be substituted in lieu of the advowson

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son in question, as it was actually conveyed to the testator, and could not pass but by proper words to the devisee; and if the testator's wife had actually had the produce of the *Lincolnshire* estate, in lieu of the estates devised to her, exclusive of the advowson in question, she must have been a loser to the amount of 10,000*l.* so much having been paid down by the testator, towards the purchase of one of the *Hampshire* estates. But in fact, no substitution was intended; for at all events, the testator's wife was to have the estates devised, and in no event the money, except for the purpose of completing the purchases; and had there been no clause at all concerning the money, the effect would have been the same; for the testator's wife would have been equally entitled to have had the purchase completed, as well out of the produce of the *Lincolnshire* estate, as of the rest of the testator's personal property.

Judgment
affirmed M.S.
Jour. sub anno
1773. p. 767.

After hearing counsel on this writ of error, the following question was put to the Judges; viz. "Whether the advowson of the church of *Mottisfont*, otherwise *Mottson*, *East Dean* and *Lockersley*, passed to Lady *Broughton Delves*, by the will of Sir *Brian Broughton*?" And the Barons of the court of Exchequer differing in opinion, they were heard *seriatim*, except Mr. Baron *Perrot*, who was ill; Mr. Baron *Burland*, and Mr. Baron *Eyre*, delivered their opinions in the negative; and the Lord Chief Baron in the affirmative: Whereupon it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench, reversing the judgment given in the Court of Common Pleas, should be affirmed; and that the record should be remitted, &c. *.

* Mr. Justice *Blackstone* in the conclusion of his Report of his Case, (Vol. II. p. 933.) says, "The judgment of the Court of Common Pleas was strongly supported in argument, by Lord *Atpley*, Chancellor, and Lord *Camden*, the only law Lords in the House. However, the question was carried without a division, to affirm the judgment of the Court of King's Bench. A day or two after which, a motion was made to rehear the cause, it being alledged, that the majority of the Lords present, were clearly for reversing that judgment, though, by a surprise, they did not divide the House. But the fact not being clearly ascertained, and also for the danger of such a precedent, the motion was withdrawn by consent."

David Power,	-	-	-	Appellant.	Cafe 30.
Samuel Windis,	-	-	-	Respondent.	

15th May, 1775.

THOMAS WYSE, deceased, being seised in fee of the town and lands of *Ballydavid*, in the barony of *Gualtior*, did, by deed duly executed by him, empower *Nicholas Wyse*, one of his agents and receivers, to demise and let the lands of *Ballydavid* for such term, and at such yearly rent, as he should think proper; and *Nicholas Wyse*, under this power, by lease, dated the 16th of *January* 1764, in the name, and as the act and deed of *Thomas Wyse*, demised these lands of *Ballydavid* to the appellant, for 31 years, to commence from the 25th of *March* then next, at the yearly rent of 78 *l.* for the first three years, and 80 *l.* sterling for the residue of the term; under which lease the appellant entered into possession of the lands, and regularly paid the reserved rent, from time to time, to *Wyse* or his agents, and took receipts for the same.

Thomas Wyse afterwards died, leaving *Francis Wyse* his eldest son and heir at law, who became entitled to the fee and inheritance of these lands, and to the rent payable thereout under the lease.

By an act of Parliament made in *Ireland*, in the 2d year of Queen *Ann*, chap. VI. s. 6. “ for preventing the further growth
“ of Popery, every Papist, or person professing the Popish religion, from the 25th of *March* 1703, is disabled to purchase,
“ either in his own name, or in the name of any other person,
“ to his use or in trust for him, any manors, lands, tenements,
“ or hereditaments, or any rents or profits out of the same, or
“ any leases or terms other than any term of years not exceeding
“ 31 years, whereon a rent not less than two thirds of the improved yearly value, at the time of making such lease, shall be
“ reserved and made payable during such lease; and all estates,
“ terms, or any other interests or profits whatsoever, other than
“ such leases as aforesaid, purchased by, or for the use of such
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“ Papist, or upon any trust or confidence, mediately or immediately, to or for his use and advantage, shall be utterly void.”

The respondent, in *Michaelmas* Term 1770, filed his bill in the Court of Chancery in *Ireland*, stating the matters aforesaid, and that the appellant was at the time of taking the lease a Papist; that he the respondent was a Protestant, and as such, and as the first real Protestant discoverer, was entitled to have the benefit of the articles or lease, in regard the same was made to commence in reversion, or on a future day; and to an account of the rents, issues and profits of the said lands of *Ballydavid*, since the making thereof. And he accordingly prayed to be decreed to the benefit of such estate and interest, as the appellant had therein under the said lease or agreement, and to be quieted and established in the possession thereof.

The appellant put in his answer to this bill, and thereby admitted the lease, and that he was a Papist; but insisted, that the rents reserved by the lease, were the full improved yearly value of the demised premises.

The cause being at issue (but no witnesses examined on either side) was heard on the 28th of *April* 1773, when the Lord Chancellor was pleased to decree, that the respondent, as being the first Protestant discoverer, within the intent and meaning of the Popery laws, was entitled to the benefit of the said lease; and therefore ordered an injunction to issue, for putting him in possession of the said demised premises.

A. Wedderburn,
A. Forrester.

From this decree the defendant appealed, and on his behalf it was contended, that the decree was not warranted by the act 2d *Ann*, which does not in any express terms preclude Papists from taking leases in reversion; all it requires is, that a lease taken by a Papist, shall not, in point of duration, exceed 31 years, nor, in point of value, be subject to a less rent than two thirds of the improved yearly value, at the time of making such lease. That the present lease came not within this prohibition, the rent thereby reserved being sworn to be not barely two thirds of the value, but the full improved yearly rent, not only at the time of making, but at the time of the commencement of the lease,

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lease, so as to preclude all possibility of doubt respecting the value; and it is the usual method of demising lands, both in *England* and *Ireland*, to make the leases commence from the next succeeding quarter day, the intervening time being of no value, either to landlord or tenant. That the Popery acts, being evidently penal laws, must receive a strict and rigid construction, and not be extended beyond the letter, to disable the Papist against common right; but must be expounded to the utmost extent of the exception of 31 years leases, in favour of the Papist, so as to give him the full benefit of the exception; and especially in the present case, where there manifestly was not the least intention of infringing on, or evading those acts. The question being a mere matter of law, was not cognizable in a Court of Equity; but the bill should have been dismissed, and the respondent left to his legal remedy; here being neither a secret trust, or any other impediment in his way, requiring the interposition of a Court of Equity, and which alone give it a jurisdiction upon the 2d and 8th of *Ann*; as hath been determined in several instances, and particularly, in the case of *Stephen's Hospital v. Swan* *.

* Vol. V.
P. 454.

But it was objected, that this was a lease in reversion, and if a lease be made to commence at the end of a month, it may equally be made to commence at the end of a year, or years, and so on *ad infinitum*, for there is no drawing the line; and the value can never be certainly known and ascertained upon a reversionary lease.

To this it was answered, that the lease in question was not a lease in reversion within the act, nor did any words in it warrant such a conclusion; which would most essentially affect Protestant landlords, by disabling them, upon a tenant's quitting at Lady Day, from contracting with a new one, should he happen to be a Papist, for a 31 years lease, to commence at the *Midsummer* following. Thus would these acts, contrary to their avowed intent, restrain the Protestant's exercise of his right over his own property; and lay both landlord and tenant under difficulties, no way conducing to the purposes of the acts.

On the other side it was said, that the single point in the case was, whether a lease for 31 years, to commence at a future day, (the

E. Thurlow.
J. Madocks.

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(the rent thereby reserved being ascertained at the date of the lease) is such an interest as a Papist can purchase? It is clear, that independent of the exception, the statute contains a universal disability on Papists to purchase any estate or interest in lands, present, future, or contingent; that it extends to all estates and interests, whether of inheritance, of freehold, for terms of years, or at will, whether in possession, or to commence at a future day, and consequently extends to an *interesse termini*; which is the interest that a tenant hath between the date of the lease, and the commencement of the term. The exception in the statute is, “other than any lease for any term of years, not exceeding 31 years, whereon a rent not less than two thirds of the improved yearly value at the time of making such lease, be reserved and made payable during such term;” so that the only excepted interest is a pure single term of 31 years, at a rent to be measured according to the value of the land at the time of making the lease. But a lease to commence at any future time, is inconsistent with the exception; because, as the value of the lands, which is to give the measure of the rent, is by the act to be ascertained at the time of making the lease, and such rent is to be reserved payable during the term, it implies, that the term is to commence at the time the lands are valued; for otherwise, as lands are subject to fluctuate in value, instead of two thirds of the value being reserved payable during the term, according to the act, the reservation may not be one third of the value, arising from the increase in the value of the land, between the date of the lease, and the commencement of the term.

But further: The purchase of an *interesse termini* is expressly prohibited by the positive clause; and as a lease to commence at a future time, cannot exist without an *interesse termini* in the mean time, and the exception goes no further than a simple lease for 31 years; therefore, as a lease to commence at a future day, carries a larger interest than the exception allows, there was no occasion to add in the exception to the words, “leases for 31 years,” the words, to “commence from the time of making;” for these words were not wanting in the text to shew, that leases to commence at a future day, are not within the intent and meaning of the legislature in the exception. If the exception is not confined to pure single leases for 31 years, in possession, why may

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may not a Papist take at one time so many 31 years leases in succession, each to commence upon the expiration of the former, as will make up a term of 1000 years, to the disappointment of the general view of the legislature; which was to prevent Papists from taking any other or greater interest in lands, than for 31 years. But admitting that no one Papist can take more than one single lease for 31 years, but that any one Papist may take a lease to commence *in futuro*, then one Papist may take a lease in possession for 31 years, another may take a lease for 31 years from the expiration of the first Papist's lease, and then another, and so on, all which leases will make successive terms in the hands of Papists, to endure to the amount of all the terms; and therefore no sound construction can be given to the statute, to answer the intent of the legislature, but to construe the exception to extend to no other leases, but leases in possession, to commence from the making. It is to be presumed, that the exception was introduced for the sake of landlords in some counties in *Ireland*, where Protestant tenants were difficult to be had; and also for the sake of Papists, who were by profession farmers, and for the sake of continuing cultivation. With these views leases in possession are consistent; but leases to commence at future times, might be used for purposes to evade the act, totally variant from the intent of the legislature in inserting the exception, which had only the present occupation of lands in view. In the present case, the shortness of the interval between the date of the lease and the commencement of the term, made no difference; for if the lease was not warranted by the exception, it was null and void by a positive law, by which all Courts, both at Law and in Equity, are bound.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of, should be reversed; and that the respondent's bill should be dismissed.

DECREE
reversed.
M. S. Jour.
sub anno 1775.
P. 793.

Case 31. The Right Honourable *John Hely Hutchinson*, Doctor of Laws, Provost of the *College of the Holy and undivided Trinity*, near *Dublin*, } Appellant.
William Gamble, Esq; and Others, } Respondents.

19th February, 1776.

QUEEN ELIZABETH, by letters patent under the Great Seal of *Ireland*, dated the 3d of *March*, in the 34th year of her reign, granted and ordained, that from thenceforth there should be one college, the Mother of an University near *Dublin*, for the education of youth and students in arts and faculties, to have perpetual duration, and that it should be called the *College of the Holy and undivided Trinity*, near *Dublin*; and ordained, that it should be a body politic and corporate with perpetual succession, and should consist of a provost, three fellows, and three scholars; and having appointed the first provost, directed, that as often as the place of provost should become vacant, it should be lawful for the said fellows and their successors, or the greater part of them, to elect a provost within three months; and granted, that the said provost, fellows and scholars, should be persons capable in law of acquiring lands to them and their successors, (except as therein is excepted) for the support and maintenance of the said College, and of the provost, fellows and scholars; and that they might have a common seal for doing their business, according to the tenor and intention of the said letters patent, in such manner as the provost, and the greater part of the senior fellows should think proper.

By an act of Parliament made in *Ireland*, 10th and 11th *Charles I.* intituled, *an act for preservation of the inheritance, rights and profits of lands belonging to the church, and persons ecclesiastical*, it is enacted, “ That all feoffments, gifts, grants, “ leases, alienations, conveyances, estates, charges and incumbrances, at any time or times from and after the 1st day of “ *June* then last past, made or done, committed or suffered by “ any archbishops, bishops, deans and chapters, archdeacons, “ pre-

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“prebendaries, or other dignitaries ecclesiastical, parsons, vicars, masters and governors and fellows of colleges, and masters, guardians, or other governors of hospitals, or any of them, of any manors, lands, tenements or other hereditaments, being any parcel of the possessions of any such archbishop, bishop, dean, dean and chapter, archdeacon, prebend, dignitary, parson, vicar, college, cathedral, collegiate church or hospital, or any ways belonging to the same or any of them, (other than such leases and grants as after in the said act, or in any other act made or to be made in the then present Parliament, were or should be expressed or authorized to be made) should be utterly void and of none effect, to all intents, constructions and purposes; any law, custom or usage, or any other thing whatsoever to the contrary, notwithstanding. Provided always nevertheless, that it should and might be lawful, to and for all and every the said archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries, and other the said dignitaries ecclesiastical, and likewise to and for the said masters and governors, and fellows of colleges and hospitals, by their writings, indented under their respective seals of office, (a counterpart whereof should be entered into the respective register books of the said archbishops, bishops, deans and chapters, and of the said colleges and hospitals, for the benefit of succession) from time to time to demise any of the lands, or other the hereditaments belonging to their respective churches, colleges and hospitals, (their dwelling houses and demesne lands only excepted) unto any person or persons, for and during the term of 21 years from the time of making thereof, whereof, or for any part whereof, there should be no other lease or estate then in being, which should not expire or be ended and determined within the space of one year then next coming; upon which lease and leases should be reserved, and continued due and payable unto the said lessors, and their successors, during the said term of 21 years, so much yearly rent or profit, or more, at the peril of the lessees who should take the same, as the moiety of the true value of the said lands or other hereditaments (*communibus annis*) at, or immediately before the time of making such lease, should amount unto, as the same should or might thereafter appear, either upon a legal trial between the successor or successors of such lessors, if they should question the same,

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“ same, and the said lessees, or their assignees, by verdict of
 “ twelve indifferent persons at the common law, or otherwise by
 “ the certificate of four or more honest, equal, and indifferent
 “ persons, authorized by commission under the Great Seal of
 “ *Ireland*, to enquire and find the same, and the said certificate
 “ approved of by the Lord Deputy, and Privy Council of that
 “ kingdom for the time being; which verdict or certificate, so
 “ respectively made or given, should be peremptory to both
 “ parties, and their respective successors and assignees during
 “ the said term: In which leases or any of them, should be
 “ contained no power, liberty or privilege for such lessees or
 “ their assignees, to commit waste, or to be punishable of
 “ waste.”

By an act of Parliament made in *Ireland*, in the 11th year of King *George II.* intituled, *an act to repeal part of the abovementioned act*, and for other purposes; reciting such part of the said act as is above set forth, and further reciting, that the issuing of such commission, and such certificate thereon, might be inconvenient; it was therefore enacted, “ That so much
 “ of the said act as related to the said commission under the
 “ Great Seal of *Ireland*, and any such certificate thereupon,
 “ should be repealed, and should from thenceforth be declared
 “ null and void to all intents and purposes whatsoever.”

King *Charles II.* by letters patent under the Great Seal of *Ireland*, dated the 27th of *May*, in the 21st year of his reign, granted several lands in the counties of *Meath* and *Galway*, (the object of the present appeal) to the then provost *Dr. Thomas Seil*, and his successors for ever, provosts of the said college, paying the several rents therein mentioned.

On the 28th of *October* 1758, *Dr. Andrews*, was by letters patent, appointed provost of the college during his life; and being seised of the said lands in fee, in right of his college, by two several indentures dated respectively, the 6th of *August* 1773, sealed with the seal of his office, he demised the lands in the counties of *Meath* and *Galway*, in trust for himself, to the respondent *William Gamble* for 21 years; reserving out of the lands in the county of *Meath*, the yearly rent of 210*l.* and out of the lands in the county of *Galway*, an annual rent of 195*l.* payable

payable respectively to him and his successors, provosts of the college.

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On the 12th of *June* 1774, Dr. *Andrews* died, having made his will; whereby, after devising his real estate to trustees, in trust to raise 3000*l.* to be paid to the provost, fellows and scholars of *Trinity college*, and to be by them applied in erecting and furnishing an observatory for astronomical observations; and also the yearly sum of 250*l.* for ever, as a salary for a professor of astronomy; he devised his leasehold interests in the counties of *Galway* and *Meath*, to his mother *Elizabeth Tomkins*, to receive the issues and profits during her life, paying 10*l.* yearly to the infirmary of *Galway*, and 10*l.* to the infirmary of *Meath*; and whoever should come into possession of either of the said leasehold interests, by virtue of his will, should pay annually 10*l.* to such infirmary; and after the death of his mother, he devised his leasehold interest in *Galway* to the respondent *Robert Gamble*, subject to an annuity of 100*l.* to the respondent *William Gamble* and *Margaret* his wife, and the survivor, and subject to 50*l.* a year to the respondent *Sarah Norman*; and after the decease of the said *William* and *Margaret*, the leasehold interest in the county of *Meath*, to *George Gamble*, subject to a farther annuity of 50*l.* to the said *Sarah Norman*; but declared, that when the said *George Gamble* should come into possession of the leasehold interest in *Meath*, the annuity of 100*l.* should determine; and appointed his mother and the respondent *William Gamble* executors: He also bequeathed to the provost of *Trinity college*, and his successors, the busts, lustres, and other furniture in the great room, and the four book cases, and busts in the library, upon confidence that they should attend the possession of the said room.

In *Michaelmas* Term 1774, the appellant filed his original bill in the Court of Chancery in *Ireland*, which was afterwards amended, against the respondents, praying, that the leases made by Dr. *Andrews*, the late provost, to the respondent *William Gamble*, might be set aside, or declared a trust for the appellant, as provost of *Trinity College, Dublin*, for his and their maintenance and support; and that the said leases might be brought into Court; and that the appellant might have an account, from the death of Dr. *Andrews*, of the rents reserved under the leases made by the

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respondent *William Gamble*, or *Eyre French*, or any other trustee of Dr. *Andrews*, and for a receiver. And for that purpose, the appellant, after stating the letters patent of Queen *Elizabeth* before-mentioned, by his bill alledged, that King *Charles I.* by letters patent dated the 5th of *May*, in the 13th year of his reign, confirmed the said letters patent of Queen *Elizabeth*, with the consent of the fellows and scholars, with several alterations and additions, reserving to him and his successors, the power of appointing a provost; and confirmed an augmentation made by the provost and fellows, by virtue of a power vested in them by the charter of Queen *Elizabeth*, to the number of 16 fellows, and 70 scholars, and likewise ordained certain statutes for the better government of the said college, in the preamble of which it is mentioned, that his Majesty took upon himself the patronage of the said college, and reserved the power of adding to, changing, or dispensing with any of the said statutes. That in the second chapter of the said statutes, intituled *Of the quality and duty of the provost*, it is directed, that the provost should so administer the affairs of the college, that he may appear not to seek his own, but the interest of the college. That by the oath prescribed by the statutes, the provost swears to preserve and administer all the benefices, farms, lands, and goods of the college, without waste, as far as he shall be able, and observe to the utmost of his power, the statutes of the college. That by the fourth chapter of the statutes, the provost is constituted the head of the society, and the statutes direct, that the seven senior fellows should be as assessors to him; and that by their counsel and assistance, he should manage all the greater affairs of the college; and that in the setting of lands, and all other instruments which ought to be authenticated under the college seal, nothing should ever be done, unless with the consent and suffrage of the provost. That by the 21st chapter of the statutes, it is ordained, that if the rents of the college should increase, the salary of the provost, fellows and scholars, may be increased in manner therein mentioned. And, that such intention of increasing salaries may be more effectual, it is ordered, that in setting to farm lands and houses, the statutes made in *Ireland* should be strictly observed; namely, that the moiety of the just annual value should be reserved to the college, in the name of rent. That the salary of the provost had been considerably increased from time to time, according to the increased value of the lands and other funds of the

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the college. The bill then stated the act of 10th and 11th *Charles I.* and the act of settlement made in *Ireland*, 14th and 15th *Charles II.* by which it is enacted, that out of the lands and hereditaments belonging to any archbishop, bishop, dean, dean and chapter, or any other ecclesiastical person or persons, which had been granted by them in fee farm, under the reservation of any chief rent or other duty, and by the said act were forfeited and vested in his Majesty, his heirs and successors, such a proportion of them should be allotted and set out for the better support of the said archbishops, and bishops, and their successors, as therein after particularly named, which should be given to them and their successors for ever: And the said statute gave to the provost of *Trinity college* near *Dublin*, out of the forfeited lands in the archbishopric of *Dublin*, and to his successors for ever, 300*l. per annum*; and directed, that for the setting out of the said lands, and the valuation of them, with more conveniency, the same should be done in such manner as the Lord Lieutenant, or other chief governor of *Ireland* should direct. That by the act of Parliament, made in the 17th and 18th *Charles II.* for explaining the last mentioned act, it is enacted, that the commissioners for the execution of the said acts, should set out so many acres of profitable land, as might be of the yearly value of 300*l.* or sufficient to secure an annual rent charge of 300*l.* to be issuing out of the same; to the intent, that the same might be a perpetual revenue for the support and maintenance of, and be settled upon the provost and his successors, in such manner as the Lord Lieutenant, or chief governor for the time being should direct. That the commissioners, by an instrument under their hands and seals, dated the 2d of *January* 1668, reciting the clause in the last act, and that the lands therein mentioned had been seized on account of the late rebellion in *Ireland*, and forfeited and vested in his Majesty, to the uses in the said act mentioned; and that the same had been brought into the common stock (as lands concealed from his Majesty) by *Dr. Thomas Seil*, then provost of the college; and that the lands appeared, by the valuation of the Lord Lieutenant and Council, to be of the clear yearly value of 300*l.* and no more; it was therefore adjudged and decreed by the commissioners, that *Dr. Seil* and his successors, provosts of the college, were by the said acts lawfully entitled to the lands therein mentioned, *viz.* the lands in *Meath* and *Galway*, which they certified to the Lord Lieutenant, to the end that letters patent might

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might be granted thereof to Dr. *Seil* and his successors, according to the intent of the said acts. The bill then stated the grant of these lands from King *Charles II.* to Dr. *Seil* and his successors. That Dr. *Baldwin*, the former provost having died, Dr. *Francis Andrews* was, on the 28th of *October* 1758, appointed provost of the said college, as above stated. That Dr. *Baldwin* having made a lease of the lands in *Meath* for 21 years, and another lease of the lands in *Galway*, to *Merick Shaw*, since deceased, for the like term; Dr. *Andrews*, as provost, disputed the validity of the leases, and brought ejectments on the title for the recovery of the possession: And that, pending the ejectments, a resolution was entered in the register book of the college, in the words following; viz. "On the 6th of *May* 1760, resolved by the board, "that if the tenants of the provost's estate, as provost, do, without a suit, give up the leases made by Dr. *Baldwin*, and should hereafter bring actions for damages against the late provost's representatives, the college will not take advantage of their not standing a suit to eviction, it being the opinion of lawyers consulted on both sides, that the leases are void." Which entry, the appellant charged, was made at the request of Dr. *Andrews*, but that Dr. *William Clement*, the acting executor of Dr. *Baldwin*, by an entry in the same book, in his own hand writing, immediately following, reserved to himself, as one of the executors, the right of proceeding as he should be advised. That by the first entry it appeared, that Dr. *Andrews* had represented to the board of senior fellows, that the college was interested in the event of the suit, which the appellant charged would not have been the case, if Dr. *Andrews* had instituted the same for his own benefit only, and not for the benefit of his successors; and in manifestation that the senior fellows were persuaded, that such suit was for the benefit of Dr. *Andrews*, as provost, and his successors, the appellant charged, that Dr. *Andrews* having evicted the lease made by Dr. *Baldwin* to *Merick Shaw*, *Catherine Shaw*, his executrix, brought her action in the King's Bench in *Ireland* against Dr. *Clement*, and *James Agar*, Esq; as executors of Dr. *Baldwin*, to recover damages for such eviction, and obtained judgment against them; and a writ of enquiry of damages having been executed, Dr. *Leland*, then burser of the college, on the 13th of *June* 1765, paid to her, out of the revenues of the college, 4572 *l.* 15 *s.* 3 *d.* for the damages found on the inquisition, and for her costs. And the bill charged, that the covenant

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from Dr. *Baldwin*, for making good the said lease, was for him and his successors only, and neither did nor could bind the college, nor extend to the representatives of Dr. *Baldwin*; which Dr. *Andrews*, who had been for many years a practising barrister, well knew, and yet, as provost, directed Mr. *Leland*, as burfars, to pay the money out of the college funds to Mrs. *Shaw*. That *Waller*, having made defence to the ejectments brought by Dr. *Andrews* for recovery of the lands in *Meath*, but having afterwards relinquished his defence, and given up the possession to Dr. *Andrews*, brought his action, in *Easter Term* 1760, against the executors of Dr. *Baldwin*, upon a like covenant contained in his lease, to make the same good; but the executors having pleaded, that there was no eviction, he withdrew his defence, and judgment was had by *covin*.: And on the 18th of *January* 1763, *Waller* filed his bill in the Chancery of *Ireland* against the executors, and against the provost, fellows and scholars; and on the 6th of *July* 1769, obtained a decree, that he should be at liberty to bring his action for damages; and that the executors of Dr. *Baldwin* should, in their plea, admit that *Waller* had been duly evicted in the said action of ejectment. That *Waller* brought such action, and obtained judgment in the King's Bench in *Ireland* against the executors for 3500*l*. but such judgment having been reversed by the King's Bench in *England*, *Waller* brought a bill in the Exchequer against the executors, and against the college; thereby charging, that he was induced to surrender his lease and give up the possession, Dr. *Andrews* having shewn him the opinion of counsel, that Dr. *Baldwin* had no power to make any lease as provost, save only for his own life; and that Dr. *Andrews* promised he should be paid his damages by the college, which suit was still depending: And that in such several suits, the college was put to great expences by the conduct of Dr. *Andrews*; and the bill charged, that *Waller* had not the least encouragement from the executors of *Baldwin* to surrender his lease: And in manifestation that the ejectments brought by Dr. *Andrews* were represented by him, and understood by the college, to be for the benefit of the succeeding provosts as well as for himself, and not for the benefit of his representatives, the appellant charged, that the said suits were supported at the sole expence of the college, and that a survey had been taken by the direction of Dr. *Andrews*, of the *Galway* estate, but the expence thereof was, at his instance, charged to and paid by the college.

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college. That Dr. *Andrews* having, at great expence and loss to the college, broke the leases made by his predecessor, under whose will the college had obtained a real and personal estate of 80,000 *l.* of which Dr. *Andrews* availed himself by obtaining, on account of that accession to the college, an annual increase of salary of 236 *l.* to himself, as provost; made several leases from time to time of the estates of *Meath* and *Galway*, for 21 years, in trust for himself; reserving out of the *Galway* estate 195 *l.* yearly, and out of the *Meath* estate 210 *l.* yearly, but subject to the quit rent of 34 *l.* 0 *s.* 10 *d.* out of the *Galway*, and 14 *l.* 12 *s.* 5 *d.* out of the *Meath* estate; that Dr. *Andrews's* lessees, in trust for him, and by his direction, made leases of the said lands for his own benefit, reserving upwards of 1200 *l.* yearly, by which he reserved to his successors, a profit rent of 355 *l.* 6 *s.* 8 *d.*; and to his representatives, a clear yearly profit of above 800 *l.* and thereby endeavoured to deprive the office of provost, of an annual sum, nearly equal to one half of the total remaining annual income of the office; though by his application for an increase of salary, it appeared, that he thought the total income arising from the office, not sufficient for the support of the provost, without such increase. That Dr. *Andrews* frequently declared, that he had 800 *l.* clear yearly profit by the said leases; and in order that it should appear upon the face of them, that the body at large had consented to the same, he recited therein, that the fellows and scholars had assented thereto; and he affixed the college seal to each of such leases, in testimony, as is therein mentioned, of such consent, though the same was never given; and he also caused an entry to be made in the register's book, importing, that the college seal was affixed to such leases, though several of the senior fellows repeatedly told him, they did not consent to the making them, and that the college seal ought not to be affixed to the same. That the first entry was made on the 11th of *June* 1770, mentioning, that on that day the college seal was affixed to a lease made by the provost, to *Eyre French*, Esq; of the provost's estate in *Galway*, for 21 years, from the 29th of *April* then last, at the yearly rent of 195 *l.* And on the same day, a further entry was made, that the college seal was affixed to a lease made by the provost, to *William Gamble*, Esq; of lands belonging to the provost, in the county of *Meath*, for 21 years, from the 1st of *May* then last, at the yearly rent of 210 *l.* and that the like entries were made on the 21st of *March* 1772. And that

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that such entries were made, without the approbation or consent of the senior fellows, or the majority of them. That on the 6th of *August* 1773, on which day no board was held, Dr. *Andrews* had two leases prepared, one of them mentioned to have been made by *Francis Andrews*, provost, on behalf of himself and successors, with the assent and consent (though contrary to truth) of the fellows, testified, as therein alledged, by the common seal of the college being affixed thereto, by which Dr. *Andrews* took upon him to demise, for him and his successors, provosts of the college, to the respondent *William Gamble*, the several lands and premises granted by the letters patent to Dr. *Seil*, situate in the county of *Meath*, for 21 years from the 1st of *June* then last, at 240*l.* a year above all taxes (quit, crown, composition, patent, and king's rents excepted) with a covenant from him, for himself and his successors, for quiet enjoyment; and at the conclusion of the lease were the following words, "In witness whereof, the said *Francis Andrews* hath hereunto set his hand and seal, and the said provost, fellows, and scholars of the said college, have hereunto affixed the common seal of the said college." One part of which indenture, sent to the appellant by the respondent *William Gamble*, one of the executors of Dr. *Andrews*, as a counterpart, appeared to have been executed by the said *Francis Andrews*, under his hand and seal, and by the respondent *William Gamble*, and no college seal affixed to the same: But that the respondent alleged, that the college seal was affixed to the part which remained in his hands. That Dr. *Andrews*, by an indenture of lease of the same date, and with the same clauses as to the assent and consent of the scholars and fellows, and, as to the college seal, demised all the lands and hereditaments in the county of *Galway*, which had been granted as aforesaid to Dr. *Seil*, and therein particularly mentioned, containing in the whole, upwards of 3500 acres, for the like term, at the rent of 195*l.* yearly, to the said *William Gamble* (*Eyre French* having, as alledged, previously surrendered the lease made to him) one part of which lease sent by the respondent *William Gamble*, as a counterpart, was not signed or sealed by the late provost, nor the college seal affixed thereto, but was executed by the respondent *William Gamble*; who alledged, that the part in his hands was executed by the provost under his own and the college seals, by which means the appellant had not true counterparts. That neither of the leases was registered, as required by the statute 10th and 11th *Charles I.*

nor

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nor was any counterpart of either filed in the college registry, nor any fee paid to the register, pursuant to the act of 12th *George II.* That the execution of the two last leases was witnessed by Dr. *Stokes*, one of the senior fellows, and at that time the senior register of the college, who as such had in his hands the registry book, in which he entered the transactions of the college. That at the time of the execution of those leases, Dr. *Andrews* delivered to Dr. *Stokes* a paper, all in his own hand writing, in the following words, *viz.* “ This day the college
“ seal was affixed to a lease made by the provost, to *William*
“ *Gamble*, Esq; of the provost’s estate, in the county of *Galway*,
“ for 21 years from the 1st *June*, at the yearly rent of 195*l.* The
“ same day the college seal was affixed to a lease made by the
“ provost to *William Gamble*, Esq; of lands belonging to the
“ provost in the county of *Meath*, for the like term of 21 years,
“ from 1st *June* 1773, at the yearly rent of 210*l.*” That Dr. *Stokes* having been called upon by Dr. *Andrews* to witness these leases, objected, that the fellows and scholars had not consented; that they had not been informed of the transaction; and that therefore the leases should be under the seal of Dr. *Andrews*, and not under the college seal: But Dr. *Andrews* replied, that he was advised by his counsel, that the leases should be drawn and executed in that manner, and as provost, directed Dr. *Stokes*, as register, to make the entry in the Register’s book, which he accordingly did; though no entry ought to have been made therein, except at a board, and no board was held on that day. That before the provostship of Dr. *Andrews*, no lease had ever been made by any preceding provost, of any part of the provost’s estate, in trust for himself, or for the purpose of giving his representatives a benefit, to the prejudice of his successors; and that the said contrivances were made use of by Dr. *Andrews*, to give these leases the sanction of having the consent of the body at large, though contrary to the truth. That Dr. *Andrews* died on the 12th of *June* 1774, having by his will, without date, made such disposition of his leasehold interests in the counties of *Galway* and *Meath*, and such bequest to the provost of *Trinity* college, as are before mentioned. That the appellant before he entered into possession of the provost’s house, gave notice in writing, to the representatives of Dr. *Andrews*, that he would not submit to the will, so far as it related to the disposition of the leases; and that it was his intention

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to controvert the same, and that he was ready to relinquish all benefit under the will, in case it was necessary to carry his said intentions into execution. And that the book cases, busts, lustres, and furniture, were of inconsiderable value, and part of the furniture was purchased at the expence, and was the property of the college. That it was the intention of the college statutes, that the salary, and other income intended for the support of the provost, should increase in proportion as the funds increased; and therefore the statutes directed, that a moiety of the annual value should be reserved to the college, in the name of rent, in all leases made by the body at large; that it was not the intention of the said statutes, nor of the act of 10th and 11th *Charles I.* that the provost should make leases at a lower rent than the body at large was capable of doing; and it was the intention of the statute 17th and 18th *Charles II.* that the succeeding provosts should from time to time receive the rents, according to their full value, for their maintenance. That no preceding provost had ever reserved less rent to his successors, than he had received himself, and that it was not just in *Dr. Andrews* to bind his successors, by covenants to make good the quiet enjoyment, under leases so injurious to them and the college. That *Dr. Andrews*, who, as provost, held the college seal as trustee for the college, and as head of that body, committed a breach of trust, by using it without the knowledge of that body, for his own purpose, to the prejudice of his successors; and that the leases recited an untruth, in reciting that the fellows and scholars had consented and assented thereto. That the college seal affixed to the leases, being evidence at law of such assent and consent, the appellant was under the necessity of resorting to a Court of Equity for relief. That *Dr. Andrews*, in exerting the authority of provost, by obliging *Dr. Stokes* to make entries of the leases in the college registry, without the knowledge of the senior fellows, and on a day when no board was held, and in opposition to *Dr. Stoke's* remonstrance, acted contrary to the duties of his office. And that the leases of the 6th of *August* 1773, the affixing the college seal, and the entries in the register book, imported, contrary to truth, that the body doing all corporate acts for the college had assembled on that day. That the college having expended large sums in the prosecution of the suits, and payment of the damages, and in the survey beforementioned, whatever benefit arose from suits should accrue

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to the head of the college for the time being, and should be considered, after the death of Dr. *Andrews*, as a trust for the succeeding provost. That Dr. *Andrews* transferring to his executors, a great part of the profits of the lands intended by the crown (the patron and founder of the college) for the support of the provosts, had injured the patronage of the royal founder, without the consent of his Majesty, and contrary to his royal intention, as Dr. *Andrews* was expressly appointed provost for his life only.

To this bill, the respondents *William Gamble* and *Margaret* his wife, and *Elizabeth Tomkins*, put in a plea and answer.—And as to so much of the bill as charged, that the lessees in trust for Dr. *Andrews*, by his directions, made leases of the lands for his benefit, reserving 1200 *l.* yearly and upwards; and that by such means, Dr. *Andrews* reserved to his representatives a clear yearly profit of above 800 *l.* and thereby endeavoured to deprive the office of provost, of an annual sum nearly equal to one half of the remaining annual income of the said office; or which charged, that Dr. *Andrews* declared, he had 800 *l.* clear yearly profit by the said leases; or which required the respondents to set forth the highest yearly rents payable out of the said lands, under the said leases made by Dr. *Andrews*, or by any trustee for him, or by any person employed by, or acting under him, and when such leases were respectively made, and by whom, when and to whom, and for what term, and when such terms commenced, and if any fine or fines were paid for making such leases, to set forth the amount thereof, and for what leases, and to whom and when paid; or which required the respondents to set forth to whom, and at what rents, and for what terms the lands were respectively set by Dr. *Andrews*, or any trustee for him, at the time of perfecting the leases of the 6th of *August* 1773; and as to all discovery touching the value of the said lands, and to so much of the bill, as sought that the said leases made by Dr. *Andrews* to the respondent *William Gamble*, on the 6th of *August* 1773, might be set aside or impeached: The respondents pleaded, the several acts of parliament made in *Ireland*, 10th and 11th *Charles* I. and 11th *George* II. and also the two leases; and said, that at the time of executing those leases, there was not any other estate or lease in being of the said lands; and said they were advised, that whether just and proper rents were reserved by the said leases, so

as

as to bind Dr. *Andrews's* successors, and whether the said leases were otherwise warranted by the laws and statutes of *Ireland*, were questions properly and solely triable and determinable, by one or more actions at law.

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The respondents *Robert* and *George Gamble*, and *Sarah Norman* demurred to the several matters to which the other respondents had pleaded. And for cause of demurrer shewed, 1st, That it appeared of the appellant's own shewing by his bill, that whether so much of the value of the lands as ought to have been, was reserved in rents by the said leases, *was a question expressly directed by positive law, to be tried by the proper action at law.* 2dly, That it appeared of the appellant's own shewing, that whether the leases which he sought to set aside, were warranted by, or agreeable in other respects to the laws and statutes of *Ireland*, *were merely legal questions, and ought as such to be tried and determined, by one or more proper actions at law.* And lastly, that it appeared of the appellant's own shewing, that no obstacle or impediment stood in his way, or prevented the trying, if he should think fit, his pretended right of avoiding the leases at law.

This plea and demurrer came on to be argued before the Lord Chancellor of *Ireland*, on the 27th of *July* 1775, when his Lordship ordered and adjudged, that the said plea and demurrer should be allowed with costs.

From this order, the provost thought proper to appeal; and on his behalf it was said, that the plea and demurrer, and his Lordship's order, were founded upon the *Irish* act of the 10th and 11th *Charles* I. but this case did not fall within that act; because none are thereby enabled to make leases for 21 years, who are not disabled from leasing otherwise. But the provost could not be disabled, because he had then no separate estate, the lands in question not having been granted to him for many years afterwards; nor had he, at any time, any power of acting separately, as to the college estate. The act mentions the master, governors and fellows of colleges, and their possessions, and enables them to make leases, by writings under their respective seals of office, of any lands belonging to their respective colleges;

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J. Dunning.

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leges; which extends to the possessions of *Trinity College*, who then had lands and a common seal; but not to the provost, who then had no lands, nor to the lands since granted to him, because they do not fall within the description of lands belonging to a college. If the lands in question were within this act, they must be considered as part of the estate of or belonging to the college; the plea and demurrer were allowed on that principle; and the plea itself stated, that the late provost was seised in fee of those lands in right of his college. If those lands were part of the estate of the college, though set apart for the support of the provost for the time being, they would fall under the direction of the college statutes; which were admitted by the answer, to be as stated in the bill. These statutes required, that in setting lands to farm, the statutes made in *Ireland* should be strictly observed; namely, that a moiety of the just annual value should be reserved: And in the chapter intitled, *concerning the quality and duty of the provost*, it is directed, "That he should so administer the affairs and business of the college, that he may appear to seek not his own, but the advantage of the college;" the seven senior fellows are made his assessors, and by their council he is to manage all the greater affairs relative to economy, and the setting of lands is to be authenticated under the college seal. The provost is bound by his oath, to observe to the utmost of his power, the statutes of the college, and to preserve and administer all the lands, possessions, and revenues of the same, without diminution or waste; he is therefore a trustee for his successors, under the direction of these statutes; and if he has diminished any part of the estate to his own advantage, and to the prejudice of his successors, and of the college, he has committed a breach of trust; and this breach of trust is not covered, because an act of Parliament has laid down the same rule; but, on the contrary, the act of Parliament gives additional strength to the college statute; which lays the provost under an official obligation, to conform his conduct to the act of parliament. Now, though it should be admitted, that a bishop, or any other person bound by the statute of 10th and 11th *Charles I.* might make leases in trust for themselves, at less rents than that statute requires, without any offence against conscience, surely no such privilege could be contended for in the case of the provost of the college of *Dublin*; but every such lease made by him, contrary to this statute, must be considered as made in breach of his

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his duty; and though a stranger, taking such lease from the provost, might be entitled to shelter himself under this statute against the hands of a court of Equity, yet the provost himself, having committed a breach of his trust, or his representative or trustee standing in his place, could have no such right; and the appellant relied upon the obligation on the provost by his oath, to observe the college statutes, as distinguishing this case, if it was a case within the statute of *Charles*, and consequently within the college statutes, (in which light the late provost himself did not consider it) from cases of leases made in trust for bishops, or other ecclesiastical bodies. And if no equitable circumstances were to induce a Court of Equity to interfere, where a provost has made a lease in trust for himself, contrary to his official duty, and to the positive injunctions of the college statutes; the provosts and senior fellows might in future times follow his example, and would be equally entitled to make leases of the great college estates, in trust for themselves, at any under value they should think proper; which would be ruinous to that great seminary of learning.

Dr. *Andrews*, when made provost, found his college in possession of about 80,000 *l.* left them by their late provost Dr. *Baldwin*; which fund, by the statutes of the college, it was his duty carefully to preserve, and it could not be diminished without his concurrence; the provost having, by the express words of the statutes, a negative in all propositions made at the board. On the 6th of *May* 1760, a resolution was entered into at a board of the provost and senior fellows, and which could not have passed without the assent of Dr. *Andrews*, by which the lessees of the provost's estate were in effect invited to give up their leases, upon an engagement by the college, as residuary legatees of Dr. *Baldwin*, that no advantage should be taken by their not standing out to an eviction. Dr. *Clement* saw the tendency of this resolution, and in fact entered a protest against it. It is admitted, that some part of the college revenues was, previous to the resolution, applied in proceedings to defeat those leases, and that Dr. *Andrews* concurred in the order to the bur-
 far to make such payment; but the consequence of the resolution was, that one of the tenants surrendered his lease, in expectation of being recompensed by the college out of the assets of Dr. *Baldwin*; and the bill charged, and the defendants did

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not deny, that a sum of 4572 *l.* was paid by the college, as damages to another of the tenants. But it was apprehended, that if the office of provost was not to receive in succession the advantage arising from the buying in of those leases out of its revenues, the revenues of the college were in this instance grossly wasted, contrary to the duty of the provost, and in effect transferred to his representatives. And though it might be objected, that Dr. *Andrews* had a right to break those leases, and that the assets of Dr. *Baldwin* were liable to make compensation; yet how far the leases thus surrendered were really impeachable, or how far Dr. *Baldwin's* assets were liable to make compensation, were matters proper to be examined into at the hearing of this cause; and the rather, as the final determination in the case of *Waller*, shewed that those assets were not liable. But at all events, the appellant conceived, that by this application of the assets, which were then part of the funds of the college, to the payment of the costs of the ejectments, and the expence of the surveys, to which the assets were certainly not liable, an Equity arose, to have the lands recovered in those ejectments go equally and fairly for the benefit of the provosts in succession. It must be presumed, that such was the intention of the college; but that intention had been defeated, by the leases made by Dr. *Andrews* for his own benefit, at little more than one fourth of the just value; and it could not be conceived, that the college intended to defray all the costs and expences of so many suits, both in law and equity, and to have paid such large sums of money in those suits, and in having surveys made of those estates, for the benefit of the executors of the late provost.

It was objected, that the act of Parliament of *Charles I.* requires, that the value should appear upon a legal trial, by the verdict of twelve indifferent persons, at the common law; that these words excluded an issue directed by a Court of Equity; that issues were to inform the conscience of the Court, and that if the respondents confessed, that the lands were set to them at less than a moiety of the true value, the Chancellor could not send it to law, and yet could not found a decree upon it.

But to this it was answered, that the act did not confine the trial to twelve men at common law; it expressly gives another method, by the certificate of four persons, authorized by commission

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commission under the great seal; which certificate, approved of by the Lord deputy and privy council of the kingdom, should be peremptory. And though this was repealed by an act of Parliament long subsequent, yet this last act was made only to prevent an unusual and unconstitutional mode of trial, and not to prevent the interposition of a Court of Equity, in cases proper for such interposition, and where a Court of Equity can give more relief than is to be had at law. This relief might be given in the present case, where an account of the rents payable by the real tenants, might be directed, and the leases to *William Gamble* might be set aside, or declared a trust for the appellant and his successors, without prejudice to the real lessees. The act does not say, there shall be no discovery; it says, the trial shall be by a jury, but does not preclude either party from coming at evidence as in other cases, and obliging his adversary to discover that evidence by his answer; and it was only contended, that such discovery was proper to be had in cases proper for the interposition of a Court of Equity. The act relates expressly to a trial between the successor of the lessor, and the lessees and their assignees, and not to a trial between the successor, and the representatives of the lessor, or to mere trustees for the lessor; and therefore did not extend to the respondents *Gamble* and *Tomkins*, who stood in the place of a predecessor who had been guilty of a breach of trust. If the respondents confessed the charge in the bill, as to the under value, it would have been a breach of trust in the late provost, and a Court of Equity ought either to decree without any trial, (because in that case, by the admission of the party there could not remain any fact to be tried) or to retain the bill, with liberty to bring an ejectment.

But supposing the provost's estate to be within this statute, and that the late provost had as good a right, observing all requisites, to demise these lands in trust for himself, as to make leases of them to a stranger; and supposing, that the particular words of this statute do in ordinary cases exclude all equitable jurisdiction, as to the value of the lands; yet it was apprehended, that as every sole corporation is a trustee for succession, no words of this statute could or ought to prevent a Court of Equity, in particular cases of leases made in trust for the lessor, and injurious to such succession, from seeing that such rent as the

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the law requires, is reserved upon such leases, so avowedly made in trust for the lessor: For if all equitable jurisdiction in such particular cases is destroyed by this statute, and if, as the respondents seemed by the nature of their defence to presume, no redress can be had from a jury, every archbishop, bishop, and other ecclesiastical dignitary, masters and fellows of colleges, and masters or governors of hospitals in *Ireland*, might make leases in trust for themselves at any low rent whatsoever, without any redress for the successor, in equity or at law. And in the present case, as it did not appear by the plea or answer, that a moiety of the value was reserved as rent, if the plea and demurrer were allowed upon a right principle, the same principle would justify the allowance of a plea and demurrer, in case the late provost had not only not reserved a moiety of the true value, but reduced the rent reserved on leases made by his predecessor, to twenty shillings yearly. Let the case of a stranger taking a lease under this statute be what it might, all that was contended for on the part of the appellant was, that where a lessee is a trustee for the lessor, who had made such lease as aforesaid, it is incumbent upon such trustee, in a Court of Equity, if he would repel the equitable jurisdiction which arises in all cases of trusts, to shew by his plea or answer upon oath, that his lessor, or *cestui que* trust, did no more than by law he might have done, if a stranger had been the lessee, *i. e.* that a moiety of the true yearly value was reserved; and the omission of this would leave the defendant in the light of a trustee for the lessor, without any foundation for the Court to presume, that his lessor could lawfully have made a like lease to a stranger; but on the contrary, the silence of the defendant in this particular, created a strong presumption, that such a lease could not have been lawfully made to a stranger.

But it was said, that if the defendants had sworn, that a moiety of the true value was reserved on these leases, it would have destroyed their plea.

If this objection was well founded, and a moiety of the true value was not reserved, the defendants had no sufficient case to support a plea; the general inconvenience having been already mentioned which must follow, if a plea of this nature will hold in every case where the true moiety of the value is not reserved.

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served, or the ancient rent reduced. But in fact, the defendants could not take upon themselves to swear, that a moiety of the true value was reserved; for if they could, it was conceived that they might, by a protestation in their plea, upon oath, that the rent reserved was not less than a moiety of the true value; and by insisting, as they had done, that whether it was or not, was only to be enquired into at law; have had the full benefit of their plea, if it ought to be allowed in a case, where a moiety of the true value was reserved. To bring a case within the statute of *Charles*, two things are required; first, that there should be no other lease in being of the lands, or any part thereof, which should not expire within one year; secondly, that there should be reserved as much yearly rents or profits, or more, as the moiety of the true value of the lands, at or immediately before the time of making, should amount to. The defendants had averred the first requisite, but had omitted the second. And in a case attended with such peculiar circumstances as the present, the Court should not have determined the question as to the validity of these leases in Equity, till those circumstances were fully laid before the Court at the hearing of the cause; and at most, should only have reserved the benefit of the plea to the hearing, with liberty to except.

It was further objected, that the tenant of a provost, college, or bishop, should not be bound to discover; that such discovery would subject him to a forfeiture; and that entertaining such a bill, might shake a considerable part of the property of the kingdom of *Ireland*, in the hands of bishops tenants.

But it was not necessary on the part of the appellant to contend, that any such tenant was bound to discover the value; he insisted, that the respondents were not to be considered in a Court of Equity as tenants; for *Gamble* and *Tomkins* were executors of the late provost, and stood in his place as to those leases, and were bound to answer; because if he was living, and had ceased to be provost, he would be bound to answer. Besides, the respondent *Gamble* was to be considered as a mere trustee for the late provost, who was himself a trustee, and had committed a breach of trust, and was therefore bound to answer whatever tended to discover this breach of trust; and the rather, as *Gamble* was a party to it, by being the nominal tenant; and that tenants

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are considered as purchasers for valuable considerations, but the respondents were mere volunteers. If the respondent *Gamble* could be considered as a tenant, and as such could cover himself by a plea from the jurisdiction of a Court of Equity; yet in his other capacity of personal representative of the late provost, he could not avail himself of such a plea, but must answer in the same manner as his testator must have done, if now living. Further: If this case had any resemblance to leases made by bishops, it could only be where leases are made in trust for the bishop, and the tenants of bishops leases are interested, that all Courts should assist against such leases, when made contrary to the act; and if such leases are fraudulently obtained, it was apprehended a Court of Equity would relieve against such frauds. But the statutes of the college, the provost's official duty under those statutes, to conform to the act of *Charles I.* by reserving half the annual value as rent, and the provost's oath, made him a trustee for his successors, as to the setting the lands for a moiety of the just value; whether the case was within the *Irish* act of *Charles I.* or not, and distinguished a lease made by him at a very great undervalue, in trust for himself, from such a lease made by a bishop. As to one of the principal grounds for allowing this plea, namely, that any answer from the defendants as to the value, might expose them to a forfeiture or penalty; it must be observed, that this point was made only at the bar, and not at all hinted at in the pleadings; and so far were the counsel who prepared those pleadings, from conceiving that this point could be of any possible use to the defendants, that they had not, by way of introduction to it, pleaded the disabling part of the statute of *Charles I.* But if this point had been made by the pleadings, the obvious answer to it was, that the whole equity of the appellant's bill was founded on fraud, and a breach of trust and duty in his predecessor, and that the defendants in this case, his trustees, were as much affected by this fraud as the predecessor himself could be, were he now living, and out of the office of provost; and no person, before the defendants, ever attempted to conceal a fraud in a Court of Equity, under the pretext that the discovery might subject him to a penalty, in a case where the decree of the Court could not possibly exceed the bounds of retribution and compensation; and where the only consequence to the defendant would be, his not being permitted to avail himself of benefits acquired by a breach of trust.

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But it was said, that the late provost acted under the power given by the act of Parliament; that a man having a power of leasing, may execute such power in trust for himself, if such lease is made pursuant to the power; that the provost can take fines; and that there is no difference between taking fines, and making leases in trust for himself.

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These leases, however, were not pleaded to have been made pursuant to the power given by the act; but on the contrary the plea stated, that the late provost, being seised in his demesne as of fee of those lands, made these leases. And though a man, with a power of leasing, may make a lease in trust for himself, it did not follow, that the provost having such a power, but governed by the college statutes in the exercise of it, could make such a lease, contrary to those statutes; and in the case of a private man, it was conceived, that equity would oblige him and his representative to discover whether the lease was fairly made, and agreeable to the power. And, if there was no substantial difference between taking fines, and making leases in trust for himself, he certainly could not have taken fines for more than a moiety of the rents; and therefore could not have taken, under a trust for himself, more than a moiety of those rents. But it was charged by the bill, and not denied, that he had taken for himself nearly four times as much as he had reserved for his successors. There seemed, however, to be a substantial difference between taking fines, and making leases in trust for the provost; for in the former case, the predecessor and successor both take fines, and there is no advantage to either, but from the chance of longer living; in the latter case, the predecessor had certain annual rents or profits, the successor had uncertain fines. Fines are a fair, open and usual mode of leasing in those cases. Leases in trust are secret, unusual, and suspicious; and the very trust, in such a case as the present, was some evidence of a fraud. The late provost held the common seal, as a trustee for the purposes of the college; he affixed it to those leases, not for the purposes of that body, but for his own, and to the prejudice of that body, and in so doing committed a breach of his trust. This breach of trust was committed, to make fictitious evidence of a fact which was untrue; namely, the assent of the senior fellows; who, or a majority of them, with the provost, give at the board, the

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the assent of the body at large. The entry made the same day in the Register book, by the order of the late provost, and from a draft in his own handwriting, (though no such entry ought to be made but at a board) was also for the purpose of introducing fictitious evidence of an untrue fact; namely, that a board was held on that day. This affixing of the seal, reciting the consent, and ordering the entry to be made, were suggestions of untruths, and were to be considered in a Court of Equity as frauds. The evidence of these facts was particularly stated by the bill, and to which the respondents only said, that they were strangers to the transaction; but to support the plea, either as to the discovery or relief, it was apprehended, these frauds should have been denied.

Yet it was said, that the provost alone could demise; and therefore what had been done as to the college seal was immaterial.

A breach of trust, and other frauds in part of this transaction; if they did not infect the whole, must raise suspicions of the fairness of it, and should induce a Court of Equity to retain the cause, for the purpose of farther investigation. But if those lands were to be considered as part of the college estate, and subject to the statutes of the college, he could not have demised, without having had the assent of his assessors. And though the provost could have demised without such assent, yet the assent of the senior fellows would give weight to these leases before a jury, in considering whether the moiety of the just value was reserved; they would appear on the trial, to have been made with the consent of the whole corporation; the common seal of the corporation was evidence of such consent; and if this evidence might be disproved, yet it did not seem to be just, that the appellant should be laid under that difficulty, and under the necessity of giving before a jury that evidence against him. The seal was *prima facie*, though fictitious, evidence of a fact that was untrue; and it seemed to be just, that it should be removed out of the appellant's way by a Court of Equity. But if the provost could alone have made a lease to bind his successors, without the consent of his assessors, he had not made such a lease; he did not appear to have ever intended to make a lease by himself singly. If the consent of the body at large was not necessary to make the leases good, under the act of *Charles I.* the reciting

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such consent, was evidence that he did not intend to make a lease under that act; and if the late provost did not intend to act under that statute, it was not reasonable, that the respondents, standing in his place, should protect themselves under it, on a supposition that the leases were made under the act.

It was also said, that the provost was to be considered as a sole corporation; and had made these leases under his private seal, which was to be considered as his seal of office.

But as the grant to the provost and his successors was by act of parliament, it was apprehended, that the successors might take, without resorting to the construction, that the provost was made by those words, a sole corporation; the intention seems to have been, to make a provision for the head of an old corporation, and not to erect a new one; and the plea said, that the late provost was seised of the lands in his demesne as of fee, in right of his college, which excluded the notion of a distinct corporation in him, and shewed that the college seal was meant to be relied upon; and though the respondents had pleaded the leases under his private seal also, yet they did not offer to waive the benefit of the college seal, or of the recitals of the consent of the body at large. The *Irish* act of the 17th and 18th *Charles II.* directs, that the lands should be settled on the provost and his successors, in such way and manner as the Lord Lieutenant and his counsel should direct; and as the Lord Lieutenant and his council never exercised this trust, it was conceived, that it devolved upon a Court of Equity, and raised an equitable jurisdiction in this case. And if the appellant went to trial, this objection might be made by the respondents against his legal title.

But admitting that the plea was good in form and substance, yet the defendants had, by their answer, over-ruled it. The bill in this case had a double aspect; it prayed, that the leases might be either set aside, or decreed to be a trust for the appellant. And there was no legal inconsistency in the alternative; for though the statute of *Charles I.* declares leases made contrary to that act void, they were only in consideration of law voidable, and in the power of a Court of Equity to mould in such manner, as to answer the justice of the case; which possibly at the hearing of the cause might appear to be, to put the appellant in the

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place of the defendants, without prejudice to their undertenants; whom the appellant always avowed an intention to preserve in their possessions under the present leases, which was also declared by his counsel upon the argument, and the only account prayed by the bill, was of the rents reserved under their leases. The defendants themselves, by their pleadings, had admitted the possibility, that the appellant might, at the hearing, succeed as to that part of his bill, which sought that these leases might be decreed a trust for him; and though a discovery of the value of the lands at the time of making the leases, must be acknowledged as essential to found that part of the relief sought by the bill, that the leases might be decreed a trust for the appellant, as to found that other part of the relief which prayed that they might be set aside; yet it seemed extraordinary, that the defendants could expect that a plea to this discovery of the value should be allowed, while that part of the alternative as to the trust, to which such discovery was equally essential, remained uncovered by the plea; and that a plea to the discovery of the rents at which the lands were set by Dr. *Andrews*, or any trustee for him, should be allowed, when if the appellant succeeded in that part of his bill relative to the trust, such an account must be directed, and such a discovery had from the defendants: And further, that this plea should be allowed, by which the appellant was entirely precluded from impeaching these leases, though the answering to such parts of the bill as related to the trust, admitted the possibility that the defendants might be divested of all beneficial interest therein, in favour of the appellant. If the leases should be decreed a trust for him, the two decrees would be inconsistent; the first determined, that the appellant should not be at liberty to impeach these leases in a Court of Equity, the second would give him the benefit of them.

The provost's duty to preserve all the lands and possessions of the college, and so to administer them as not to seek his own advantage; his endeavouring to obtain his advantage, in a manner never before practised; his obligation to use the college seal for no other purpose, than to authenticate the acts of the body at large; the breach of trust in that respect, the untrue recitals in these leases; the improper entry in the register; the breaking the former leases at the expence of the college, and at so great a loss to that body; and the carrying on the suits for the eviction

tion of those leases, at the sole expence of the college, and taking the surveys of those estates at the like expence; were circumstances distinguishing the present case from all others; and required the fullest discovery and discussion, before it should be determined, that the doors of a Court of Equity should be shut against the appellant and his successors.

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As to the demurrer, the allowing it supposed, that though all the facts in the bill were true, yet it contained no equity. From such determination, and the principles on which it was founded, it would follow, that no reduction of the rents of church, college or hospital lands, nor any means used to conceal such reduction, by fictitious evidence, nor any frauds practised in setting any of their possessions, ought to induce a Court of Equity to give the least assistance. A principle, which might be attended with the most fatal consequences to public charities, the great seminary of learning, and the established religion of the kingdom of *Ireland*.

On the other side it was said, that the relief prayed by the bill was in the alternative, either that the leases might be set aside, or that the respondent *Gamble*, the lessee, might be declared a trustee as to them, for the appellant and his successors. The first part of the relief was founded upon two charges, inconsistent with each other: 1st. That the leases made by Dr. *Andrews* were void, because one moiety of the clear yearly value of the lands was not reserved, according to the intent and meaning of the act of *Charles I.* 2dly, That though the power of leasing given by this act, had been strictly pursued, the leases made to the respondent *Gamble* should be set aside, because the lands in question were not granted to the provost of *Dublin College* and his successors, by the statute of *Charles I.* but by virtue of the acts of settlement and explanation made in the reign of King *Charles II.* The second part of the relief was founded upon charges, that the college seal, of which the provost is a trustee, was fraudulently affixed to the leases, without the consent of the fellows and scholars; that by some clandestine proceedings, the leases were entered in the registry of the college; that they were made in trust for the late provost and his representatives; that under such circumstances of fraud and breach of trust, the appellant was entitled to the beneficial interest; and that therefore,

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A. Wedderburn.
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fore, the respondent *Gamble* ought to be declared a trustee for the appellant and his successors. The bill also prayed a discovery of the truth of the charges, as applied to each mode of relief; and particularly as to the value of the lands.

The relief founded upon the charges of fraud and breach of trust, was at present out of the question; the respondents having fully answered those charges. Whether therefore the appellant would be able to make out a case to entitle him to the relief prayed under this head, was a matter which must be reserved to the hearing of the cause. However, if the late provost had been guilty of every species of supposed fraud imputed to him, it would not affect the leases; for it could not be denied, but that he had a right in his politic capacity, and as a sole corporation, to elect, and make use of a seal of office. He affixed not only the college, but his own seal to the leases, which he had an absolute right to make, without the consent of the senior fellows, who had nothing to do with the lands belonging to the provost. And as to the leases being made in trust for him and his representatives, it was apprehended, that this could be no objection to the validity of such leases, which were not only warranted by many authorities, but by universal practice. It could make no difference to a successor, whether the beneficial interest was in one person or another. It was clear, that the provost had a right to make a lease, reserving a rent of half the annual value, and to take a fine for the other half. If the lease was made to a stranger, the fine was taken; if to a trustee for the provost, he took the beneficial interest instead of the fine; but to the successor, both cases were the same. The only material question therefore was, whether the power of leasing had been pursued; and whether the successor had every benefit that was intended him. And it was also to be observed, that this part of the relief was impossible; as the trust of the leases, admitting them to be good at law, could not go to a successor.

To the first part of the relief, and to the discovery of the value of the lands, which was the foundation of that relief, the respondents had pleaded the statutes of 10th and 11th *Charles I.* and 11th *Geo. II.* and had therefore insisted, that the validity of the leases was solely determinable at law. That leases of lands belonging to the provost of *Dublin* were within those acts, was not only evident

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evident from the true construction of them, but was, in the present instance, admitted by both parties; the appellant by his bill having made those very acts part of his case, and the respondents having relied upon them in their plea. Before the act of *Charles I.* all corporations in *Ireland*, whether sole or aggregate, had an unlimited power of alienation. To restrain this power, and correct the mischiefs of it, this act was made. It is the only one in *Ireland*, which limits and confines the power of alienation incident to every corporation at common law. The first clause, which is *disabling*, takes away generally the power of alienation from all ecclesiastical corporations, and from masters, governors, and fellows of colleges; which was done, as is declared in the preamble of the act, to preserve the inheritance of corporations for the benefit of succession; and in construing this first clause, it would be necessary to give it such an interpretation, as would best answer the avowed purposes of the act. Masters and governors, and fellows of colleges, were expressly disabled, and therefore the words were intended to take in the head of a college, sole seised. The second clause, which is *enabling*, empowers all those who are disabled by the former clause, to make a partial alienation of their inheritances, under particular restrictions. The enabling clause extends to every person in the disabling one, so that if a provost sole seised is disabled by the first, he must therefore be enabled by the second clause; otherwise his power of alienation must, to this day, remain as it was at common law, unlimited and unconfined.

But it is objected, that the provost derives his title to the lands in question, under the acts of settlement and explanation, made subsequent to the statute of *Charles I.* which therefore could not extend to lands, of which the provost was not *then* seised.

The statute of *Charles I.* has always been considered as a remedial law, and should therefore receive a liberal construction. The provisions in it are general, and not to be confined to lands only in the possession of ecclesiastical and lay corporations at the time of making the act; they extend clearly to the preservation of all lands of archbishops, bishops, masters and governors, and fellows of colleges. But if the lands in question were not bound by this act, they remained as at the common law, without any restriction as to the powers of leasing and alienation.

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It is further objected, that the act of settlement directs, that the Lord Lieutenant and Council shall prescribe in what manner the lands shall be set out.

* 4 Burr.
2154.

But this direction does not in any respect relate to the power of leasing, which is not altered or abridged by any parts of the Acts of settlement and explanation; and this point has been already determined, by the unanimous opinion of all the judges of the Court of King's Bench in *England*, in the case of *Clement and Agar*, the executors of *Dr. Baldwin*, against *Waller*, on writ of error from the King's Bench in *Ireland* *. Every lease made in pursuance of the act of *Charles I.* "is rendered void, if a moiety
"of the true value of the lands, at the time of making such lease,
"be not reserved; as the same shall appear either by a legal trial
"between the successor of the lessor and the lessee, by verdict at
"common law, or by certificate of commissioners to be appointed
"by the great seal, which verdict or certificate shall be peremp-
"tory to both parties." The act of *Geo. II.* repealed the power given to the commissioners to determine questions of value, from whence it manifestly appears, that the legislature wisely judged, that this power was of such importance, as to be trusted only to a jury. Under such a protection, tenants are not exposed to tedious and expensive suits; church and college leases are rendered less precarious; agriculture is encouraged, and lands are greatly improved. The act of *Charles I.* expressly declares, that questions of value shall be tried by a jury, and a jury only; so that the jurisdiction of declaring the leases to be void on the head of value, is denied to a court of equity, not only by the general construction of the courts of justice, which does not admit of courts of equity assuming a jurisdiction in matters merely cognizable at law; but courts of equity are also clearly precluded from any jurisdiction in this case, by Act of Parliament.

The plea being a good bar to the *relief*, it was of consequence, a good bar in this case to the *discovery*. Because the discovery sought by the bill, was made merely subservient to the relief, and was not a discovery prayed in aid of the legal jurisdiction; for the appellant prayed to be relieved in equity, by having the lease set aside, in exclusion of the legal jurisdiction. The discovery pleaded to, related only to the matter of value; this could be prayed for the purpose only of supporting the first head of relief

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and if that relief was improper for equity, the discovery incident to it, must be equally improper. But had the bill been, merely for a discovery, for the purpose of giving the answer in evidence at law, yet as this case was circumstanced, a court of equity would not have compelled the respondents to make any discovery respecting the value of the lands; no principle being better established, than that equity will not oblige a person to discover a defect in a legal title, when it may occasion a forfeiture by Act of Parliament. So upon the statute of *Henry VIII. of pluralities*, the Court would not compel a discovery, whether after institution to one living, the defendant was presented to two other livings, and instituted *. And in the case of *Hamilton v. Clements*, in the Court of Chancery in *Ireland*, *Clements* insisted, that he was not bound to answer even as to the value of a college lease, because the lease would be void, if the reserved rent was less than half the value; exceptions were taken to the answer, and it was reported insufficient; but the exception was over-ruled by Lord *Bowes*, who held, that *Clements* was not bound to answer to the value, because the lease might be evicted by aid of the answer. The statute of *Charles I.* by confining questions upon the validity of leases made in pursuance of that act, to a *legal* determination only, has emphatically excluded every other mode of trial. If courts of equity in *Ireland* were permitted to entertain suits respecting the value of ecclesiastical and college leases, it would occasion infinite mischief and confusion in that kingdom; where a great part of the property is held under leases made by virtue of this very act, which was manifestly calculated to guard against discovery and relief, in the manner sought for by the present appellant.

* *Poteler v. Allington*,
3 Atk. 453.

As to the demurrer, there was no difference between it and the plea, other than in the form of the defence; the substance of the defence in both, was the same. The plea stated the two Acts of Parliament, and set them out; the demurrer referred to them as being stated in the bill, and as the known law of the land, which a party is not bound to plead, or shew to the Court. The substance therefore, of the bar in the demurrer being the same, the argument was the same, which the respondents contended was sufficient to support the order appealed from; and therefore hoped, the appeal would be dismissed with costs.

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ORDER
affirmed.
M. S. Jour.
sub anno 1776.
P. 345.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order therein complained of, affirmed.

Case 32. *John Crang and Mary his Wife,* - Appellants.
John Adams, Esq; - - Respondent.

29th February, 1776.

IN *Easter Term* 1775, the respondent exhibited his bill in the Court of Exchequer, against the appellants and others, setting forth, that *William Purnell*, deceased, was in 1703, and for several years before, seised in fee (amongst other freehold lands and hereditaments) of the several closes of ground, called the *Grove*, *Crabtree Close*, and the *Tynings*, otherwise *Purnell Tynings*, lying in *Timsbury* in the county of *Somerset*; and it being in that year apprehended, that there was a considerable quantity of coal under these lands, *Purnell* agreed with one *Henry Bull* (since deceased) for working the veins of coal under such lands; and thereupon, by indenture dated the 2d of *December* 1703, *Purnell*, in consideration of the covenants, conditions, reservations and agreements, therein aftermentioned and reserved, did demise and grant, unto the said *Henry Bull*, his executors, administrators, and assigns, free liberty, licence and authority, to search, dig, and open any pit or pits of coal, in, or upon any part or parcel of his the said *William Purnell's* ground, lying in *Timsbury* aforesaid; together with free liberty of ingress, egress and regress, for any person or persons, to take or carry away all such coal as should be digged, or landed, in or upon any of the said premises, or any part thereof; to hold the said coal work, mine and veins of coal whatsoever, to him the said *Henry Bull*, his executors, administrators, and assigns, from the date abovementioned, for 100 years (except as to the close called the *Grove*, which was to be only for 12 years); yielding and paying unto the said *William Purnell*, his heirs and assigns, the eighth part, free wrought, of all such coal as should be digged, landed, and sold upon the said premises or any part thereof:

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payable once in a month, or oftner if required. And *Bull* thereby covenanted to allow to *Purnell*, his heirs and assigns, for trespasss, as should become due and payable, during the term; the same to be paid half yearly, and the *quantum* thereof to be settled in manner therein mentioned; and also to fill up all pits, as should be by him, or his representatives opened on the said premises, when, and as they should become uselefs, and to rid and carry into some convenient place in the said ground, as *Purnell*, his heirs and assigns, should direct or appoint, all such rubbish, wark, and cavage as should be landed on the premises, and level all such places as should be made thereon, and also at the end of the term, to leave the bounds in good and sufficient repair, as the same should be at the entry thereunto. And *Purnell* thereby covenanted, that *Bull*, his executors, administrators, and assigns, should, and lawfully might peaceably and quietly have, hold, and enjoy the said premises, and every part thereof, to search, dig, and mine for coal, during the term thereby granted, under the covenants, reservations, and agreements, thereby expressed and mentioned, without any molestation, interruption, or denial of him, his heirs or assigns, or any person lawfully claiming under him or them. That by virtue of this lease, *Bull* very soon after entered into a copartnership with one *Britton* and *Hodges*, for working the said coal mines, and *Bull* alone, or with them, or one of them, did search, dig, and open a pit for coal, upon the said close called the *Grove*, and worked the same about four or five years, and took and carried away all the coal dug therein, and from time to time paid to *Thomas Kent* Clerk, his heirs or assigns, the eighth part free wrought of all such coal. That in 1708, or 1709, they opened a pit for coal in the close called *Crabtree Close*, and continued to work the same until the death of *Bull*, and paid from time to time to *Kent*, who was owner of the said close, the eighth part free wrought of all such coal as was dug, landed, or found thereon. That in, or soon after 1709, *Bull* died, having by his will given all the residue of his personal estate, to *Ann Bull* his then wife, and appointed her sole executrix, who duly proved the same, and she after his death, alone, or with *Britton* and *Hodges*, or one of them, continued to work the said colliery on *Crabtree Close*, till about 1718, when they began to dig for coal on the close called the *Tynings*, and intended to have proceeded in properly working the same; but the veins or drifts unexpectedly diverting their course from the *Tynings*, into an adjoining ground

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ground called *Dudmead*, and the level of the *Tynings* being much lower than that of the closes called the *Grove* and *Crabtree Close*, they were prevented from so doing, and desisted from working the *Tynings*, on account of the great body of water that lay against them. That *Ann Bull*, by her will, dated the 2d of *March* 1718, gave to her three daughters *Mary*, *Ann*, and *Eleanor*, all her right and title to the coal works at *Timsbury* aforesaid, and elsewhere, and made them executrixes, and she afterwards dying in 1719, her said three daughters duly proved her will. That the said *Eleanor Bull*, by her will, dated the 20th of *February* 1721, gave to her sisters, *Mary* and *Ann*, all her real and personal estates whatever, and appointed them executrixes, and she afterwards dying in the said year 1721, *Mary* and *Ann Bull* duly proved her will. That in *September* 1722, *Thomas Busb* intermarried with *Mary Bull*, and by indenture, dated the 20th of *August* 1728, the said *Ann Bull* the other daughter, in consideration of 100*l.* assigned to *Busb*, all her right in the said coaling lease, for the residue of the said term. That by indenture, dated the 21st of *March* 1766, made between the said *Thomas Busb*, and *Mary* his wife, of the one part, and the respondent of the other part, *Busb* and his wife, for a good and valuable consideration, assigned to the respondent, his executors, administrators and assigns, the said mines and coal works, for the residue of the said term. That *William Purnell* the lessor, died on the 30th of *January* 1703, intestate, leaving *John Purnell* his eldest son and heir, who became thereupon seised of the said closes, subject to the said lease; and he soon afterwards disposed of the close called the *Grove*, to *Benjamin Bowditch* in fee, and *Bowditch* and *Purnell* soon afterwards sold and conveyed the two closes called the *Grove* and *Crabtree Close*, to *Thomas Kent* Clerk, and his heirs, who afterwards died, leaving *Ann* (afterwards *Ann Roach* widow) his only child and heir at law. That by lease and release, dated the 17th and 18th of *March* 1731, *Ann Roach* conveyed the closes called the *Grove* *Crabtree Close*, and the *Tynings*, to *Thomas Short*, and *William Purnell* and their heirs; and by other indentures of lease and release, dated the 26th and 27th of *March* 1744, *Short* conveyed one moiety of the said three closes, to *Matthias Purnell* and his heirs. That the last named *William Purnell* died in *August* 1759, leaving *Mary Purnell*, spinster, his only child and heir, who by lease and release, dated the 30th and 31st of the said month

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month of *August* 1759, conveyed her moiety of the said three closes called the *Grove*, *Crabtree Close*, and the *Tynings*, to the said *Matthias Purnell* and his heirs. That *Matthias Purnell* afterwards died, leaving the appellant, *Mary Crang*, his only child and heir, and having by his will devised all his real estates to both the appellants, their heirs and assigns for ever; and that the appellant, *John Crang*, for some time before the filing of the bill, had been, and then was, in possession of all the said closes. That from the year 1718, until very lately before filing the bill, the mines or veins of coal, under the said three closes, could not be worked, by reason of the great body of water, which during all such time lay therein, and therefore the said *Thomas Bush*, and *Mary* his wife, *Ann Bull*, and *Eleanor Bull*, after the death of *Ann Bull* the mother, were obliged to forbear working the said colliery, and they did not receive any benefit of the lease during such time. But as the working of the colliery was come about again, the manner of getting coal deeper in that country being since discovered and improved, *Bush*, in *October* 1762, gave notice to the appellant *John Crang*, and to other persons who claimed a right to the said closes called *Crabtree Close* and the *Tynings*, that he the said *Thomas Bush* intended to work the mines under the said lands, in pursuance of the aforesaid lease. That the respondent, after he became entitled to the benefit of the said lease, did, in *July* 1773, sink pits on the close called the *Tynings*, for working the coal under it; but that the appellants and the other defendants insisted, that the respondent had no right to the said colliery, and therefore they very shortly afterwards, in a forcible manner, interrupted and prevented the respondent and his workmen from proceeding in the said coal work; and that the appellants had lately erected a coal work, and sunk pits on the land, wherein such authority was by the said lease granted, and had dug and opened many pits in the said lands for coal, and thereby got great quantities of coal to a considerable value, and continued working the same; insisting, that the said lease, or the right under it, had been surrendered up, or that it was barred and extinguished by reason of its not having been exercised for many years. In answer to which, the respondent by his bill charged, that at such time as aforesaid, on account of the great body of water which lay in the colliery, it became impracticable to prosecute working it, and therefore, and on account of the nature of the said grant, the respondent insisted, that he ought not

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not to be prejudiced or affected in his right to dig the said mines, on account of any length of time incurred without having worked the mines. The bill also charged, that if the appellants, or either of the other defendants, were purchasers of the said lands, or derived title thereto under purchasers for a valuable consideration, such purchasers had previous notice of the said lease, or of the right and claim to the said colliery; and particularly, that such lease, right, or claim, was excepted or mentioned in all or most of the deeds and writings, under which the defendants claimed the lands. That *Thomas Kent* always acquiesced under the lease, and received his free wrought part or share of the coal raised from the lands, called the *Grove* and *Crabtree Close*, agreeable to the reservation in the lease. That the respondent, in *Hilary Term* 1774, brought an action of trespass in the Common Pleas, against the appellant *John Crang*, on account of the obstruction by him given to the respondent's working the coals, in the said lands called the *Tynings*; and that the respondent had given notice of trial of such action at the Summer Assizes in 1774, for the county of *Somerset*, at which time and place the respondent attended with his attorney and witnesses, in order that the cause might have been tried; but that the appellant *John Crang*, knowing that the respondent could not try his said action without the production of the deeds and writings, under which he derived his title to the said lands called the *Tynings*, refused to produce the same, although the respondent had caused notice in writing to be given to him for that purpose; and that the said appellant *John Crang* then refused to admit, that the first named *William Purnell* deceased, was seised of or entitled to the said lands, on the said 2d day of *December* 1703; and that the respondent being on that account unable to proceed to trial of the said action at law, the appellant threatened to enter up judgment against the plaintiff as in case of a nonsuit, pursuant to the act of parliament in that case made and provided. And the bill also charged, that the appellant *John Crang* threatened to continue to work the collieries, in the said lands and grounds, or part thereof, and that he would never account with the plaintiff for the produce thereof.—And therefore the bill prayed, that the respondent might have a full disclosure and discovery of all the matters aforesaid, and that the appellants, and the other defendants, might in particular set forth, whether the said lease or liberty was not excepted or mentioned in all or some, and which

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which of the deeds which had been executed concerning the said closes, since 1703, and in what words, or whether any and what persons or person had, and when or by what deeds or deed, writings or writing, surrendered, released, or extinguished the said right or liberty; and that the appellants, and the other defendants, might set forth a full and true particular of all deeds and writings in their respective custody or power, in any ways relating to the said parcels of land called the *Crabtree Close*, and the *Tynings*, otherwise *Purnell's Tynings*, or to either of them, and that they might leave all deeds and writings in the hands of their clerk in Court, for the inspection of the respondent, or with liberty for him to take copies or extracts thereof, at his own expence; and that the appellants might be restrained from proceeding to judgment against the respondent, and also from working the said mines.

To this bill the appellants put in a plea and answer, as to so much of the bill as sought a discovery from the appellants, whether the said first named *William Purnell* was in 1703, or at any other time seised or entitled in fee simple, of or to the said three closes or any of them, and as required the appellants to set forth a particular of all deeds and writings in their power, relating to the said parcels of land, and to leave the same in the hands of their clerk in Court, or as sought any discovery from the appellants touching such deeds and writings; the appellants pleaded, and for plea said, that from the year 1718, to the time of filing the bill, any person or persons, having lawful authority, might, without their own wilful default, at any time or times, and during all the said space of time, have searched for and dug, or opened any pit or pits for coal, in or upon all or any of the said closes, and dug or landed coal therein found, and with horses, carts and carriages, have taken and carried away the same, without any impediment arising from any water, or body of water, or any other cause whatsoever, such person or persons using the same, or the like means to carry off the water, which were in use and practice in the year 1718. That according to the true construction of the said lease of the 2d of *December* 1703, it appeared to have been the true intent and meaning of the parties thereto, that the said *Henry Bull*, the lessee therein, and his representatives, should at all times diligently and duly use and prosecute the licence thereby granted, of digging for

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and landing coal, in the lands and closes comprised in the said lease, to the end that the said *William Purnell* the lessor, his heirs and assigns, might continually have, and receive the eighth part of such coals so landed upon the said premises, and sold, according to the reservation in the said lease. And the appellants for further plea said, that as it appeared by the respondent's bill, that no person, by virtue of the said lease, had dug, or opened any pit for coal in the said closes, by reason whereof no profit whatsoever did or could accrue to the lessor, his heirs or assigns, between the year 1718 and the year 1773, (being a period of 55 years) they insisted, that the respondent ought not to be assisted by a Court of Equity, to obtain a discovery of such matters pleaded to, against the appellants.

This plea was argued on the 18th of *November* 1775, before the Lord Chief Baron, Mr. Baron *Eyre* and Mr. Baron *Hotbam*, (Mr. Baron *Burland* being absent) when the Lord Chief Baron declared his opinion, that the plea ought to be allowed; but the two other barons dissenting, the Court was pleased to order, that it should be over-ruled.

J. Dunning.
J. Madocks.

To reverse this order, the present appeal was brought; and in support of the appeal, it was said to appear by the bill, that the respondent could not proceed in his action of trespass against the appellants, without proving at the trial, that *William Purnell* was seised of the closes in question, in 1703; and therefore the principal relief prayed by the bill was, that the appellants might answer to that fact; if it should be admitted, their answer might be given in evidence at law, and if not admitted, the bill prayed a production of the appellants title deeds, and that the respondent might be permitted to take copies, to be given in evidence at law. This part of the relief was prayed merely in aid of the legal jurisdiction; and therefore there was no prayer of a *quantum damnificatus*, or any other relief respecting the trespass for which the action was brought. But the bill also added another relief, upon which the Court could not decree until the title was established at law; namely, an injunction to restrain the appellants from working for coals, in the places in question. The point of the plea was, to oppose that part of the relief which was sought to aid the legal jurisdiction, and the ground of the plea was, that there not having been any enjoyment

enjoyment under the licence stated in the bill for a period of 55 years, a Court of Equity ought not to assist the respondent; and the more especially, as the ceasing to work for coals for 55 years together, was contrary to the intention of the parties in the original agreement, and to the manifest injury of the appellants, and those under whom they claimed.

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But the respondent, conscious that the objection of his neglect and breach of covenant had weight, alledged by his bill, that those under whom he claimed were compelled by inevitable necessity to desist from working, by reason of the great body of water which lay upon the coal, and which late improvements in mining now enabled him to carry off. The plea therefore averred the contrary; *viz.* that from the year 1718, to the time of filing the bill, the coals under the premises might have been got, without impediment from the water, by the like means to carry off the water, as were in use and practice in the year 1718. If this fact was not true, the respondent might reply to the plea, and dispute it. The question therefore now was, whether taking it for true, that coals had during the 55 years been capable of being worked, the not working them during that period, was a sufficient reason why a Court of Equity ought not to interfere to assist the respondent? If the deed stated in the bill, instead of being a *mere licence*, had been a conveyance of the land, either at law or in equity, the statute of limitations of King *James I.* would at law have barred the right of entry; and in equity would have been a bar to any relief. So equity follows the statute of limitations, in refusing relief to the mortgagor, after twenty years possession in the mortgagee; for as it is the policy of the law, so is it the policy of Courts of Equity, not to assist old dormant claims to affect men's estates. In the present case, there had not only been a non-user of 55 years, but a non-user contrary to the intention of the parties, and in direct breach of their contract, to the actual detriment of those, who during the 55 years had been the owners of the land.

From the nature of mining leases, where part of the produce of the mine is reserved to the lessors, it cannot be disputed, but that it is the intention of the parties, that the lessee shall work the mine; otherwise, the lessor is wholly without any profit arising

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arising from his lease. In the agreement in question it was expressly stipulated, that the share of coal reserved, should be paid once in a month, or oftner, and the satisfaction for the trespass to the herbage of the land in working, should be paid half yearly: So that it was plainly in the intention of the parties, that the coals should be continually worked, to produce a profit upon the lease monthly, and as that would occasion an injury to the land, that such injury should be compensated half yearly. A total cessation therefore from working, for 55 years together, was an abandonment of the agreement, by a conduct in direct breach of the intention of the parties, and a manifest loss and damage to the owners of the mine during that period; and the person who has been guilty of a breach of his agreement, wilfully, for a number of years together, to the damage of the other contracting party, is not to be relieved upon the contract in a Court of Equity; for he that seeks relief in a Court of Conscience, must himself have acted conscientiously in the matter touching which he seeks to be relieved. For these reasons it was hoped, that the order would be reversed, and the plea allowed.

E. Thurlow.
A. Wedderburn.
G.L. Newnham.
W. Ainge.

On the other side it was said, that laying aside any objection to the claim of the respondent, arising from the length of time for which no act was done on any of the lands, under the lease or licence in question; he would be clearly and indisputably entitled to all the discovery, which was attempted to be avoided or covered by this plea; 1st, Whether *William Purnell*, the lessor, was not, at the time of making the lease, seised or entitled in fee, or otherwise, of or to the closes in question. 2dly, The particulars of the deeds and writings relating to those closes in the custody of the appellants, and a production of them for the inspection of the respondent. The first particular was necessary, to shew the respondent's right in those lands, the lease being in general terms, of all the *ground* of the lessor in *Timbury*, without mentioning any particulars; except that in the *habendum* there was mention made of the close called the *Grove*, as to which the lease was long since determined, it being, as to that, only for twelve years. And the second particular was necessary for the same purpose; and also to shew, that the appellants derived their title to these closes, called the *Crabtree* and the *Tynings*, under the lessor *William Purnell*; and further to shew, that if they were, or claimed under purchasers for valuable considera-

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tions, they had notice of this lease, or of the right claimed by the respondent.

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On arguing this plea in the Court of Exchequer, it was admitted, and it could not be disputed, that this case did not fall within the statute of limitations. Nor could the want of exercise of the liberty granted, for a long number of years, prejudice the licence at law; which was not by the terms of the grant to be exercised continually, or at any stated times, but generally; which must mean at the discretion of the lessee, or his representatives, and when, and as they should think fit, during the term. And it was a sufficient answer to the objection in the plea, that by the lessee's not working the coals, the lessor lost the profit which he would have had by the eighth part of the coals gotten; that the lessee, during the same time, lost seven times as much, and his term was wearing out. But supposing this want of exercise of the liberty, to be any objection to the respondent's now setting it up, the validity of it was proper to be determined at law, by way of defence on the trial of the respondent's action, but ought not to be set up in bar to the discovery of the matters here pleaded to; which discovery, and particularly the fact of the lessor's being the owner of the two closes in question, was absolutely necessary to enable the respondent to support that action, and bring the circumstance of the length of time in question; so that over-ruling the plea, left the appellants at full liberty to have the benefit of the length of time on the trial of the action, whereas allowing the plea would, in a summary way, totally deprive the respondent of an opportunity of trying his right at law. And it was conceived to be the doctrine of Courts of Equity, that the ground of a plea in bar to the discovery, was not so extensive as a plea to the relief sought by a bill.

But the plea, though bearing that name, was little or nothing more than a demurrer, being wholly argumentative, except as to one fact; which was in general, that the mines might have been worked at any time from 1718 to 1773, as well as now; and that fact was averred in the plea, by way of denial of a charge inserted in the respondent's bill, as a reason for the long forbearance in working the mines; viz. that on account of the water therein, it was impossible to work them, until new methods were lately invented in that country for draining the water.

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ter. And though, on arguing the plea, it was insisted by the appellants counsel, that the equity of the bill depended on this charge, which was so denied by the plea, yet that was a groundless argument; it being confessed by the respondent, that he had no other equity to entitle him to the discovery in dispute, than every person setting up a legal demand has, to come into equity against the defendant for the discovery of a fact, necessary to support his case on a trial at law.

Order affirmed. M. S.
Jour. sub anno
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After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of, affirmed.

Case 33. *William Bouchier*, M. D. and *William Denison*, D. D. } Appellants.

George Taylor, Respondent.

7th March, 1776.

ON the 11th of *March*, 1743, Mrs. *Ann Millington*, spinster, died intestate, and in *Easter Term* 1744, the appellant *William Bouchier*, and his sisters *Frances Hersent*, wife of *Peter Hersent*, and *Anna Maria Denison*, mother of the appellant *William Denison*, being cousins german once removed, and as they apprehended, the only next of kin to the intestate, applied to the prerogative Court of the Archbishop of *Canterbury*, to have letters of administration of her personal estate granted to the appellant *William Bouchier*. But they were informed, that caveats had been entered on behalf of *Ursula Hanyold* and *Theresa Dutiling*, and others, claiming to be next of kin of the intestate; and thereupon several proceedings were had in the Prerogative Court, in support of the interests of the appellant *William Bouchier*, and the other claimants; and in this state of litigation, letters of administration, dated the 24th of *March* 1745, were granted to *Henry Lascelles*, *pendente lite*.

In *Hilary Term* 1746, *Alice Merchant*, by her proctor, appeared and intervened in the said suit; alledging, that she was cousin-

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cousin-german and next of kin of the intestate *Ann Millington*, as being the only surviving child of *Francis Millington*, brother of Sir *Thomas Millington*, Knt. the father of *Ann Millington*; and shortly after the exhibiting such claim, she died, having a few days before her death made her will, dated the 20th of April 1746, whereby she gave all her real estate, and the residue of her personal estate to the respondent *George Taylor*, and *Hannah* his wife, and appointed *Thomas Sebastian Turst*, and *Walter Jobber*, her executors.

Turst and *Jobber* soon after the death of *Alice Merchant*, proved her will in the Prerogative Court of *Canterbury*, and on the 26th of May 1747, appeared by their proctors, and as executors of *Alice Merchant*, whom they alledged to be the cousin-german and next of kin of the said *Ann Millington*, became parties to the suit about administration to her.

All the parties, except the appellant *William Bouchier*, and *Thomas Sebastian Turst*, and *Walter Jobber*, and *Robert Evans*, *Thomas Crowter*, *Catherine Brookes* and *John Grassett*, one of the executors of *Margaret Grassett* deceased, having withdrawn their several claims, or forborn to appear therein, several allegations were exhibited as well on behalf of the appellant *William Bouchier*, as *Thomas Sebastian Turst*, and *Walter Jobber*, and also on the behalf of *Robert Evans*, *Thomas Crowter*, *Catherine Brookes*, and *John Grassett*, and witnesses were examined on behalf of all parties; afterwards, publication having duly passed, the cause was heard, on the 15th, 16th, and 17th days of January 1754, before Sir *George Lee*, judge of the prerogative Court; but at this hearing, *Robert Evans*, *Thomas Crowter*, *Catherine Brookes* and *John Grassett*, made default in appearing. On the 23d of the same month, the judge made his decree, and was pleased to declare, that *Robert Evans*, *Thomas Crowter* and *Catherine Brookes* had failed in the proof of their pretended interest; and that *John Grassett* had failed in the proof of *Margaret Grassett* having been the cousin-german, or next of kin of *Ann Millington*; and that *Thomas Sebastian Turst* and *Walter Jobber* had failed in the proof of *Alice Merchant*'s having been the cousin-german or next of kin of *Ann Millington*, and was pleased to pronounce against the interest of *Turst* and *Jobber*, and to pronounce and decree for the interest of the appellant *William Bouchier*, that he

was

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was the lawful cousin-german once removed, and as far as appeared to the Court, the next of kin of *Ann Millington*; and also to decree letters of administration of the goods, chattels, and credits of the said *Ann Millington*, to be granted, under proper bond, to the appellant *Dr. Bouchier*: And the judge was also pleased to condemn *Robert Evans*, *Thomas Crowter*, *Catherine Brookes*, and *Thomas Sebastian Turst*, and *Walter Jobber*, in the costs of the said suits respectively, so far as concerned the proceedings on their respective interests therein.

From this sentence the proctor for *Turst* and *Jobber* dissented, and entered a protest of appeal, but such appeal was never prosecuted; and therefore soon after the sentence, letters of administration of the personal estate of *Mrs. Ann Millington*, were granted to the appellant *William Bouchier*, as he was cousin-german once removed, and next of kin, in which it was mentioned, that the letters of administration granted to *Henry Lascelles* were determined by his death, and the determination of the suits.

About four years after pronouncing this sentence, viz. on the 20th of *October* 1758, the respondent *George Taylor* and *Hannab* his wife (having procured themselves to be admitted to sue in *forma pauperis*) filed their bill in Chancery, against the appellant *William Bouchier* and others; praying, that the appellant *Bouchier* might account with the respondent and his wife, for all the personal estate of the intestate *Mrs. Ann Millington*, and that the will of *Alice Merchant* might be carried into execution, and the trusts thereof performed. For this purpose the bill charged, (among other things) that *Thomas Millington*, heretofore of *Newbury* in *Berks*, died in *October* 1630, leaving a widow, named *Mary*, and four sons, viz. *John*, *William*, *Thomas* and *Francis*, late father of the said *Alice Merchant*, and two daughters, named *Mary* and *Elizabeth*, and that another son of the said *Thomas Millington* of *Newbury*, named *Humphry*, was born after his father's decease, and soon after died, and that the said *Thomas Millington* of *Newbury*, made his will, dated the 9th *July*, in the 7th year of his Majesty King *Charles I.* wherein he gave several legacies to his wife and four children, *John*, *William*, *Thomas* and *Francis*, and that the said *John* and *William Millington*, two of the sons of the said *Thomas Millington* of *Newbury*, died long since, *William* without issue, and *John* leaving one son named *John*, who also died without issue.

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issue. That *Thomas* the third son of *Thomas Millington* of *Newbury*, studied physic at the university of *Oxford*, and became famous in his profession, and received the honor of knighthood, from King *Charles II.* and in 1679, married *Ann Hannab King*, widow, by whom he had issue one son, named *Thomas*, and three daughters, named *Mary*, *Ann*, and *Frances*, which *Frances* died in the lifetime of her father. That Sir *Thomas Millington* died on the 5th of *January* 1703-4, in the 74th year of his age, a widower, having first made his will in favour of his children, *Thomas*, *Ann* and *Mary*; and that *Thomas*, son of Sir *Thomas*, died in 1714, a bachelor, having made his will, as in the bill mentioned; that *Mary Millington*, daughter of Sir *Thomas*, died in 1735, intestate; and that *Ann Millington* died the 11th of *March* 1743-4, unmarried, and intestate, seised of a real estate to the amount of 2000*l.* per annum, and possessed of a personal estate to the amount of 60,000*l.* and upwards. That *Francis Millington*, fourth son of *Thomas Millington* of *Newbury*, and younger brother of Sir *Thomas Millington*, and father of *Alice Merchant*, in 1655, married *Alice Cleaver*, of *Bloxam*, in *Oxfordshire*, and did then go to live at *Bloxam*, and about the 5th of *May* 1702, died there, aged 72 years, and that he had issue by *Alice* his wife, three sons, named *Robert*, *Edward* and *Francis*, and seven daughters, named *Frances*, *Elizabeth*, *Mary*, *Elizabeth*, (the other *Elizabeth* being before dead), *Alice*, *Ann*, and *Sarah*, all of whom, except *Alice*, died before the intestate *Ann Millington*; and that *Alice* intermarried with *Daniel Merchant*, and survived him, and was the only child of *Francis Millington* of *Bloxam*, who survived the intestate *Ann Millington*; and that upon her death, *Alice Merchant* became entitled to all her personal estate, as her cousin-german, and only next of kin, and being so entitled, applied to the Prerogative Court of *Canterbury* for administration of the intestate's personal estate; but the same being contested, and suits being instituted by the appellant Dr. *Bouchier* and several others, and those suits not being determined in her lifetime, she was not able to obtain the same. The bill then stated the death and will of *Alice Merchant*, and the proving it by her executors *Turft* and *Jobber*, and their becoming parties to the suits in the Prerogative Court, and the judge's decree therein, and the protest of appeal from it, and charged that *Turft* and *Jobber*, being much hurt in their circumstances by the great expences they had been at in the said suits, and being only mere executors, declined to prosecute

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such appeal at their own expence. It was also stated, that *Turft* died in 1754, and that *Jobber* refused to proceed or prosecute the appeal, unless the respondent and his wife would be at the expence thereof, which they, being in low and reduced circumstances, were by no means able to support.

To this bill the appellant *Dr. Bouchier*, *Frances Hersent* and *Anna Maria Denison*, in *Hilary Term* 1759, put in their joint plea upon oath, and thereby alledged, that *Ann Millington* died intestate and unmarried, and without leaving any father or mother, brother or sister, uncle or aunt, nephew or neice, or cousin-german, to their knowledge or belief. They also stated in their plea, their application to the Prerogative Court, for the granting administration of the personal estate of *Ann Millington*, to the appellant *Dr. Bouchier*, the suits instituted in the said Court about such administration, and the proceedings and decree or sentence therein, and the granting of administration to the appellant *Dr. Bouchier*, as being the cousin-german, once removed, and next of kin of the intestate, *Ann Millington*; and that they were advised, that the Court of Chancery had not any jurisdiction, nor ought to hold plea of the validity of any letters of administration, granted in the Ecclesiastical Courts of this kingdom; but that such matters wholly belonged to the Ecclesiastical Courts, and therefore they pleaded the sentence of the Prerogative Court of *Canterbury*, in bar to the said bill.

On the 27th of *April* 1759, this plea being argued before the Lord Keeper *Henley*, his Lordship was pleased to order, that it should stand for an answer, with liberty for the plaintiffs to except thereto, (except as to the account and discovery of the personal estate of Mrs. *Ann Millington*) but at the same time reserved the benefit of the plea till the hearing of the cause.

Accordingly the plaintiffs took exceptions, and the appellant *Dr. Bouchier*, and his sisters, *Frances Hersent*, and *Anna Maria Denison*, in *Trinity Term* 1759, put in full answers. By their answers they declared, that they did not know, nor could form any belief, whether *Alice Merchant* was the daughter of a person named *Francis Millington*, but verily believed, that her father, or the person in the bill called her father, was not the brother of Sir *Thomas Millington*; and insisted, that the sentence

of the Prerogative Court of *Canterbury* was evidence sufficient to shew, that *Alice Merchant* was not the first cousin of the intestate Mrs. *Millington*. They also stated, that the real estate of Mrs. *Ann Millington*, descended to *Thomas Woodward*, *Thomas Bouchier*, and *Anne* and *Mary Towerson*, as her heirs at law; they being the descendants and great grand children of *Mary Millington*, the sister of Sir *Thomas Millington*, and aunt of the intestate *Ann Millington*, and that they were in possession thereof, under a decree of the Court of Chancery, and a verdict in the King's Bench, on an issue directed out of the former court.

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On the 17th of *June* 1760, the plaintiffs replied to all the answers; but no further proceedings were had in the cause, for five years and upwards, and till after the death of the plaintiff *Hannah Taylor*, and of the defendants *Anna Maria Denison*, and *Walter Jobber*.

On the 31st of *October* 1765, the respondent filed his bill of revivor and supplement, against the appellant Dr. *Bouchier*, and the appellant Dr. *Denison*, as administrator of his mother, *Anna Maria Denison*, and also against *Mary Foster*, as administratrix of *Walter Jobber*, to have the proceedings revived against them; and by way of supplement, stated, that *Thomas Millington*, of *Newbury*, who was therein charged to be the father of Sir *Thomas Millington*, and of *Francis Millington* of *Bloxham*, had a daughter named *Elizabeth*, by his second wife, and that *Elizabeth* intermarried with Dr. *Joseph Ford*, of *Combe*, in *Oxfordshire*, and that *Alice Merchant* went to live with him, and called and owned Mrs. *Ford* to be her aunt, and that Mrs. *Ford* called and owned the said *Alice* to be her niece, and that Dr. *Ford*, and *Francis Millington*, called each other brothers, and Dr. *Ford* and his wife, called the family of the *Bouchiers*, at *Hanborough*, cousins. It was also alledged, that Sir *Thomas Millington*, and *Francis Millington*, of *Bloxham*, were, and were always reputed to be brothers, and that *Francis Millington* and his family received great assistance from Sir *Thomas Millington* towards their support, and that the children of Sir *Thomas* visited the children of *Francis*, as relations, and made them several presents; and further, that Dr. *Thomas Bouchier*, and *Frances* his wife, the father and mother of the appellant Dr. *Bouchier*, also visited *Francis Millington*, and *Alice* his wife, and called themselves cousins. The bill
also

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also stated, that *Walter Jobber*, one of the executors of *Alice Merchant*, in 1747, went to *Newbury*, in *Berks*, and searched the register of the parish of *Newbury*, and found an entry of the baptism of *Elizabeth*, daughter of *Thomas Millington*, of *Newbury*, and procured a certificate of it, by *Mr. Robert Penrose*, the rector of *Newbury*, and delivered such certificate to *Mr. Farrer*, then the proctor for him and *Turst*, the other executor of *Alice Merchant*. That *Walter Jobber* afterwards ceased to employ *Mr. Farrer* as his proctor, and employed another proctor, and that *Mr. Farrer*, on delivering up his papers to *Jobber*, alledged that the certificate was mislaid, and could not be found. That *Jobber* again went down to *Newbury* to search the register there, but, on such second search, found the leaf whereon the baptism of *Elizabeth Millington* was entered, torn out of the register book, and therefore could not obtain a certificate. That the appellants pretended, that the wife of *Dr. Ford* was not a daughter of *Thomas Millington*, of *Newbury*, but that *Dr. Ford* married *Elizabeth Toms*; but that they knew there were two persons who lived at *Combe*, and were called *Dr. Fords*, one being *Joseph Ford*, who was a clergyman and rector of *Hanborough*, and was married to *Elizabeth Millington*, daughter of *Thomas Millington*, and was afterwards deprived of his living in *Oliver Cromwell's* time, and quitted the gown, and studied physic, which he afterwards professed at *Combe*, to the time of his death; and the other being one *Joseph Ford*, who was an apothecary at *Combe*, and husband of *Elizabeth Toms*.

In *Hilary Term* 1766, the appellants put in their answer to this bill. The appellant *Dr. Bouchier*, in his answer denied, that to his knowledge or belief, *Thomas Millington* of *Newbury* had by his second wife, or any wife, a daughter named *Elizabeth*, or any other daughter, besides *Mary*, mother of *Frances*, the wife of *Dr. Thomas Bouchier*, deceased, and grandmother of the appellant *Dr. Bouchier*. He also denied, that *Elizabeth*, daughter of *Thomas Millington* of *Newbury*, or any daughter of *Thomas Millington*, did ever intermarry with *Dr. Joseph Ford*, of *Combe*, in the county of *Oxford*; or that *Alice Merchant*, one of the daughters of *Thomas Millington*, of *Bloxam*, ever went and lived with him occasionally, or ever called or owned any wife of *Joseph Ford* to be her aunt, or that any wife of *Joseph Ford* ever called or owned

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Alice Merchant to be her niece, or that *Dr. Ford* and *Francis Millington*, of *Bloxam*, called each other brothers; but said, that he did not know, whether there was any other relationship between them. He also said, that he believed there was a distant relationship between *Dr. Ford*, and *Dr. Thomas Bouchier*, the father of the appellant *Bouchier*, but did not know what it was; nor did he believe that there was a great friendship between them, or that they ever made presents to each other. He said, he believed that *Walter Jobber* might go to *Newbury*, in *February 1746*, and that if he did search the register of the parish of *Newbury*, he found an entry of the baptisms of *Mary, John, William, Thomas* and *Francis*, children of *Thomas Millington*, of *Newbury*; but he did not believe, that *Jobber* did, or could then, or at any other time, find any entry of the baptism of any daughter of *Thomas Millington*, of *Newbury*, named *Elizabeth*; or that he procured such certificate, as in the bill was mentioned to have been signed by the *Rev. Mr. Penrose*, the rector of *Newbury*; and he was the further confirmed in this belief, because he had received the following letter from *Mr. Penrose*.

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“ S I R, *Newbury, Berks, Feb. 12, 1746.*

“ I was very much alarmed by some gentlemen, who came to
“ this town yesterday, to consult our register, about the children
“ of *Mr. Thomas Millington*. They apprehended, that *Mary*
“ the eldest daughter, was born in 1615; and finding that the
“ leaf in the register for that year was torn out, and many names
“ wanting, they immediately concluded it was done with design,
“ and left the town in that opinion. As soon as I was informed
“ of this discovery, I immediately determined to make you, Sir,
“ acquainted with it, as I understood that your claim was de-
“ rived from the said *Mary Millington*. But upon sending for
“ the clerk (who has in this parish always kept the register),
“ and examining very carefully, I soon found, that the gentle-
“ men were in an error. The entry of *Mary Millington*, who
“ was born many years after they apprehended, is still in the
“ register. I thought myself obliged to write this to you, Sir,
“ as I did not know either the names or abode of the gentlemen,
“ to obviate any impression that you might receive from a report,
“ that our register had been fraudulently castrated.

I am, Sir.

Your most obedient humble servant,

Thomas Penrose, rector of *Newbury*.

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The appellant *Bouchier* also said, by his answer, that Dr. *Joseph Ford*, who practised physic at *Combe*, intermarried with one *Elizabeth Toms*, daughter of *Martin Toms*, of *Barton*, in the county of *Bucks*, and that he was the only Dr. *Ford* who practised physic; but that whether he was ever an apothecary, or kept a shop, or sold medicines, the appellant did not know. And that *Joseph Ford*, the elder, who was father of Dr. *Joseph Ford*, of *Combe*, was a clergyman, and rector of *Hanborough* about 1636, and continued so till he went to *Mexbury*, in the county of *Northampton*, of which place he was also rector, and there resided till his death, in *December* 1665, having been rector of *Mexbury* about eighteen years. That he never to his remembrance had heard, nor did he believe, that Dr. or Mr. *Ford*, who was rector of *Hanborough*, was ever deprived of his living at the time of the grand rebellion, or that he ever quitted the gown, or read or studied physic, or that he ever practised or professed physic at *Combe*, or any where else; or that *Joseph Ford*, the son, ever was a clergyman, or enjoyed any benefice in the church, or was deprived of any church preferment; or that the said *Joseph Ford*, the father, ever intermarried with any daughter of *Thomas Millington*. But he had been informed, and believed, that *Joseph Ford*, the elder, in *June* 1637, surrendered a copyhold estate at *Hanborough*, to the use of himself for life, with remainder to the use of his wife *Bridget* and her heirs; from which it appeared, that her Christian name was not *Elizabeth*. That the suggestion in the bill, that *Alice Millington*, afterwards *Merchant*, went to live with the said *Joseph Ford* and his wife, and occasionally called or owned Mrs. *Ford* to be her aunt, and that Mrs. *Ford* called and owned *Alice* to be her neice, appeared to be without the least foundation of truth, from the following circumstances; viz. That *Joseph Ford* died in 1656, and Dr. *Bouchier* was not married to *Frances* his wife, neice of Sir *Thomas Millington*, till 1681; and that *Alice* was not born till 1685.

The respondent having replied to the answers of the appellants, examined some witnesses; but all the witnesses who were formerly examined for the appellant Dr. *Bouchier* in the Prerogative Court, being dead, no proofs were taken on the part of the appellant.

On the 11th of *March* 1774, the cause was brought to a hearing, as against the appellants only, before the Master of the Rolls,

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Rolls, several orders having been previously obtained by the appellants, for proving the death of witnesses examined in the suit about administration to Mrs. *Ann Millington*, in the Prerogative Court, and copies of allegations and depositions there, and also a decree in Chancery in two causes, about the right to the real estate of the intestate Mrs. *Ann Millington*, one between *Charles Hitchman* plaintiff, and *James Grassie* and others defendants, and the other between *Charles Hitchman* plaintiff, and *Thomas Bouchier* and others defendants, and particularly a general order for reading *the proceedings in the Prerogative Court*. On this hearing, his Honour was pleased to order, that the parties should proceed to a trial at law in the Court of King's Bench, in the next *Trinity Term*, or the Sittings after, or at any such other time as the Chief Justice of that Court should appoint, on the following issue; viz. whether *Francis Millington of Bloxam*, father of the intestate *Alice Merchant*, was brother of Sir *Thomas Millington*, in the pleadings mentioned? And the plaintiff there was to be plaintiff at law, and the appellant *Bouchier* was to be defendant; and his Honour reserved the consideration of costs and all further directions, till after the trial.

The appellants conceiving that they were aggrieved by this order, and that no issue ought to have been granted, but that the respondent's bill should have been dismissed, appealed to the Lord Chancellor *Bathurst*, and the appeal was heard before his Lordship on the 21st of *July 1775*; when his Lordship was pleased to order, that the issue directed by the Master of the Rolls should be varied, and should be "Whether the testatrix *Alice Merchant*, was the cousin-german and next of kin of *Ann Millington*, in the pleadings mentioned, at the time of the death of the said *Ann Millington*." His Lordship also ordered, that the trial of the issue should be at the bar of the Court of King's Bench, in *Hilary Term* then next, or at such other time as that Court should appoint; and with this variation, the order of the Master of the Rolls was affirmed.

From this decree the appellants appealed; and on their behalf it was said, that there were two general grounds, on which it was conceived the issue to try, *whether Alice Merchant was the cousin-german and next of kin of the intestate Ann Millington*, ought to have been refused; one that the sentence of the Ecclesiastical

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fiastical Court, by which the letters of administration were granted to the appellant Dr. *Bouchier*, excluded the Court of Chancery from the power of directing an issue; the *other*, that if the Court had the power, yet under the particular circumstances of the present case, it ought not to have been exercised in favour of the respondent. And it would be proper to view the case in *both* these lights.

It must be conceded, that so far as regards the granting of administration, and all suits for contesting the right to it, the Spiritual Courts are possessed of a *sole* and *exclusive* jurisdiction. Another thing equally uncontrovertible is, that the same Courts have also a jurisdiction in respect to the *distribution* of intestate's effects, but this differs from the *former*, because it is merely *concurrent*; the Court of Chancery having a jurisdiction over the *same* subject. And from these two positions, flowed the objections to the Court of Chancery's power of interference in the present case; for upon an investigation into the consequences which must arise from such an interference, it would appear to operate, both as an *invasion* of the Spiritual Court's *sole* jurisdiction, and as an *undue controul* of its *concurrent* one. In the suit in the Spiritual Court, about the right to *administer* to Mrs. *Ann Millington*, the question was precisely the same as that which the respondent wanted to litigate, in the bill he had brought in Chancery for the benefit of a *distribution*. Had Dr. *Bouchier* and *Alice Merchant* claimed the administration to Mrs. *Millington*, as her relations in *equal* degree, the Ecclesiastical Judge would have had a right to prefer Dr. *Bouchier*, on the supposition that his pedigree was not controverted, or being controverted was well proved, without coming to any decision on the relationship set up by *Alice Merchant*; and if the Judge had proceeded on that principle, her claim would have been as unimpeached, and as open to litigation in a suit for distribution, either in the same Court, or in the Court of Chancery, as if Dr. *Bouchier* had never obtained the administration. But the case which really existed, was quite of a different kind. According to the pedigree on which *Alice Merchant* founded her pretensions, she was *first cousin* to the intestate, whereas Dr. *Bouchier* only claimed to be *first cousin once removed*; and this inequality of claimed relationship, rendered it impossible to avoid pronouncing sentence on *Alice Merchant's* pedigree; because if it was true, it was beyond the power of the Ordinary to give

give the administration to Dr. *Bouchier*. The consequence of this in argument, seemed decisive against the jurisdiction of the Court of Chancery, over the cause of distribution instituted by the respondent. The object of his proceeding in that Court, was to have *Alice Merchant* declared the next of kin of Mrs. *Ann Millington* at her death; but this object could not be attained, without contradicting the sentence of the Ecclesiastical Court, which declared that *Turst* and *Jobber*, the executors of *Alice Merchant*, had failed in proving her the next of kin, and therefore gave the administration to Dr. *Bouchier*. Should such a contradiction be allowed of, it would wholly counteract the decision of the Spiritual Judge, by disappointing Dr. *Bouchier*, and those in the same interest, of the fruits of that decision, and by depriving them of the benefit of distribution, to the benefit of which they would otherwise be necessarily entitled. Thus under colour of exercising a jurisdiction in a question of distribution, the Court of Chancery would indirectly impeach and subvert the foundation of a sentence granting administration, and prevent its beneficial consequences to the appellants; and therefore would in effect invade the sole jurisdiction of the Spiritual Court in point of administration, as much as if it was to repeal the administration itself.

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But it was further proper to consider, that as in the present case, the question determined by the sentence in the suit about administration, was the same as if the suit had been for distribution, so the effect of it ought to correspond, and be the same in point of conclusion; because the principles on which a sentence in one suit for distribution, operates as a bar to another for the same purpose, is, that the same person shall not try the same question, in respect to the same subject, in two different suits; and this applies equally to a sentence in a suit for administration, when the point adjudged is the same as it would have been if the parties had contested about distribution. Accordingly, in the Ecclesiastical Court, this would have been the effect of such a sentence granting administration, and there it would be pleadable in bar to a suit for distribution; and the effect ought to be the same in the Court of Chancery, both on account of the justice and reasonableness of the rule, and for the sake of producing uniformity in the exercise of concurrent jurisdictions. The sentence granting administration to Dr. *Bouchier*, being

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then to be considered as a sentence in a suit for distribution, it could scarce be contended, that such a sentence would not be a bar to a second suit for distribution, though instituted in another Court; for that would be arguing for a right to resort to two concurrent jurisdictions successively, for the trial of the same question, and if allowed, would give occasion to clashing and contradictory determinations; and the Court *last* applied to, could not proceed with any effect, without preventing the execution of the sentence of the Court *first* applied to; which would be assuming a most unreasonable controul over a Court having equal cognizance of the cause, and would in fact amount to an exercise of *appellate* jurisdiction.

At the hearing before the Lord Chancellor, it was objected, that *Alice Merchant* being dead at the time of the sentence in the Ecclesiastical Court, Dr. *Bouchier* was then become as near of kin as any other person; and therefore it was competent for the Spiritual Judge to prefer him to the administration, without deciding any thing as to distribution. But this objection was without the least foundation; for it was settled soon after the statute of distribution, that the right to administration which exists *at the death of the intestate*, is transmissible; and that the representatives of that person, who was *then* next of kin, have the same right to it, as such person, if living, would himself have. The sentence granting the administration to Dr. *Bouchier*, was full evidence of the practice of the Ecclesiastical Court in this respect; for as a foundation for giving him the administration, the sentence *previously* declared, that the executors of *Alice Merchant* had failed in proving her next of kin; from whence it must be inferred, that if they had not so failed, the administration would have been granted to them.

It might also be objected, that the respondent was not a party to the suit in the Ecclesiastical Court, and therefore ought not to be bound. But there was a very obvious answer to this. *Turst* and *Jobber*, the executors of *Alice Merchant*, as trustees for the respondent, and all others beneficially interested under her will, were the proper persons to contest with Dr. *Bouchier*; and the respondent, as residuary legatee of *Alice Merchant*, was as much bound by the event of the suit with her executors, as if he had been a party; unless he could shew, that the executors had pleaded *faintly*, or in any manner carried on the suit *collusively*.

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collusively. Executors are ranked by the civilians amongst the *legitimi contradictores*; i. e. persons who having the *primary* and *principal* right, may prosecute or defend suits, so as to conclude others, whose rights are of the *secondary* and *dependent* kind; which is the reason for allowing such third persons to intervene. A writer of great authority on the civil law*, in explaining where *res inter alias acta* shall bind third persons, says, *sua natura ac propria vi necet vel prodest sententia aliis, quam inter quos lata est, quoties lis tractatur cum legitimo contradicторе, a quo ceteri jus suum tanquam a fonte derivant ac recognoscunt*. He next explains the term of *legitimus contradicтор*, by adding, *is, quem legitimum contradicтоrem appellamus, unde præjudicium vel commodum, quod ex tali sententia quoad tertium aboritur, decimus plenius esse, atque rei, etiam quoad hunc, judicatæ vim obtinere; neque enim tertio, qui inititur juri legitimi contradicторis, eoque ad causam suam uti necesse habet, eandem quæstionem denuo retractare licet*. The same author then proceeds to illustrate the doctrine by examples; and amongst them, we find the case of an *hæres factus*, or *scriptus*, who, so far as concerns the personal estate, answers to an *executor* amongst us, and legatees; in respect to whom he says, *pariter si scriptum, hæredem superaverit is, qui legitimam vindicabit hæreditatem, etiam legatariis ac fidei commissariis nocebit sententia, ut demonstrat Papinianus; totum enim legatorum jus dependet ab institutione hæredis, unde vires capit testamentum, quæ an recte se habeat vel non, inter scriptum et legitimum hæredem disquiri debet. Cui quidem quæstioni hodie locus tantum foret, si ex alio capite, quam injusta præteritione vel ex hæreditione liberorum vel parentum, testamenti jus impugnatur; his enim casibus, annullata institutione, cætera servantur*. If then, as in the case here supposed, sentence against the executor in respect to the constitution of the will itself, on which the right to the whole property of the testator depends, is binding upon the legatees; *a fortiori* ought a sentence, which, as in the present case, only decides as to a *part* of the property claimed under *Alice Merchant's* will, to be so. But it is not peculiar to the civil law, or the practice of our Ecclesiastical Courts, that sentence against an executor binds the legatees; for in this instance, our temporal courts adopt a like rule. Decrees in the Court of Chancery against executors, are conclusive against legatees, and all others beneficially interested in the personal estate, though the latter are not parties to the suit, unless the executors plead faintly,

* *Erici Mauricii dissertatio de jure interventionis. Sect. 15.*

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faintly, or *collude*; and judgments against executors in the Courts of Common Law have a like effect, though in them legatees *cannot* be parties. Nor could the respondent reasonably complain of any hardship, in applying the rule to his case. He could not alledge *ignorance* of the pendency of the suit there; for it appeared by the supplemental bill, and by the answer to it, that he had a correspondence with Dr. *Bouchier* on the subject, soon after the death of the intestate Mrs. *Ann Millington*; and in truth, he was a most active person in the affair from the beginning; which was proved by several of the witnesses examined for *Turst* and *Jobber*, in the Ecclesiastical Court; who deposed, that they gave their evidence at the instance of the respondent. If he had been dissatisfied with the manner in which *Turst* and *Jobber* litigated the affair, he might by the rule of the Ecclesiastical Court, have *intervened*, by an allegation *pro interesse suo*, and so have made himself a party to the suit. As to faint pleading or collusion, it was not so much as suggested by the respondent, that either of them was imputable to *Alice Merchant's* executors in their suit with Dr. *Bouchier*.

It might also be objected, that *Turst* and *Jobber*, against whom the sentence of the Ecclesiastical Court was pronounced, refused to prosecute an appeal, and suffered the fifteen days allowed for that purpose to elapse, without using the opportunity; and that as the respondent was not a party, the suit and appeal could not be carried on by him; and therefore it would be very hard to bind and conclude him by a sentence, from which he was not at liberty to appeal. But it should be recollected, that mere hardship will not vary the legal effect of a sentence in the Ecclesiastical Court; and upon that it was, that the question, whether the Court of Chancery hath the power to grant an issue, must turn. Besides, if there was any hardship in the case, it had entirely proceeded from the respondent's own conduct, and he had brought it upon himself. The suit in the Ecclesiastical Court, between Dr. *Bouchier* and the executors of *Alice Merchant* was pending for seven or eight years after her death; and during the whole of that time, the respondent was at liberty to have made himself a party; and if he had done so, he would have had the same right to an appeal, as if he had been a party from the beginning.

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Another objection might be urged, that the Lord Keeper's order upon the appellants plea to the jurisdiction, having been acquiesced in by answering, it was now too late to use the sentence of the Ecclesiastical Court, either as excluding the jurisdiction of the Court of Chancery, or as a bar to the relief prayed by the respondent. But by attending to the words of the Lord Keeper's order it appeared, that so far from deciding upon the effect of the sentence, and over-ruling the plea, he only ordered that it should stand as an answer, with liberty for the respondent to except to it, and expressly reserved the benefit of the plea till the hearing. By this manner of proceeding, his Lordship, though he held the sentence insufficient to preclude the respondent from the benefit of an answer, yet reserved the final consideration of the sentence till the hearing of the cause; and consequently, left the appellants at liberty to avail themselves of it in every other way, except by avoiding to answer.

But however clear the Chancellor's power might be, in point of *jurisdiction*, however unavailing the proceedings of the Ecclesiastical Court in point of *conclusion*; the appellants still hoped, that the case of the respondent was not such as entitled him to an issue. In the instance of suits for the distribution of an intestate's effects, the power of the Court of Chancery to direct issues to try who were the next of kin, seems peculiarly to be a matter of *discretion*; the Courts of Common Law not being competent to such suits, and consequently, the trial by jury being unattainable, except through the special interposition of the Lord Chancellor. Now in the present case, there was a concurrence of the strongest circumstances, to influence the exercise of discretion against the respondent. Some credit and respect were surely due to the sentence of the Ecclesiastical Court, in a case so confessedly within the peculiar sphere of its jurisdiction; more especially, where a sentence was pronounced, as it was in the case in question, after a long and expensive litigation of ten or eleven years, and after an examination of every witness, and the hearing of every kind of evidence which the utmost diligence of the most adverse parties could adduce, while the business was recent; more than *one hundred* witnesses having been examined in that *single* branch of the suit in the Prerogative Court, which concerned the claim of *Alice Merchant*. But this was not the only trial which the

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question now in controversy had undergone. The same question was agitated in the year 1754, respecting the *real* estate of the intestate, Mrs. *Ann Millington*; and it being tried by a jury, at the bar of the Court of King's Bench, upon an issue directed out of the Court of Chancery, a verdict was given against the very identical pedigree which the respondent now set up; and that verdict was afterwards confirmed by a decree. And though the competitors for the *real* estate, were different persons from those now contending for the *personalty*, and therefore the verdict and decree were not binding upon the respondent; yet the knowledge of those proceedings, which were referred to in Dr. *Bouchier's* answer to the respondent's original bill, and had been resorted to by the respondent, in order to make use of the depositions taken in the suit about the real estate, and were read at the hearing of the present cause, tended to make the sentence of the Ecclesiastical Court still more satisfactory, and ought therefore to have some weight in the scale of discretion. To this sentence, and this verdict of a jury, against the pedigree on which the respondent founded himself, might be added, the extreme weakness of the evidence brought to support his claim, and the great strength of that produced against it. And it might also be observed, that some of the witnesses, who swore to circumstances the most material, if they had been true, to prove the relationship of *Alice Merchant* to the intestate *Ann Millington*, grossly and apparently perjured themselves. This would account for the Spiritual Court's condemning *Turst* and *Jobber* in costs; a severity, which as they were only executors in trust for the respondent, they would scarcely have experienced, if the court had not deemed them guilty of improper conduct in making use of such evidence. And several exceptionable witnesses having acknowledged that they were examined at the instance of the respondent, made it difficult to free him from a suspicion of the like criminality.

Nor should the great length of time, during which there had been an acquiescence on the part of the respondent, or the tardy manner of prosecuting his suit when it was commenced, be forgotten. The sentence of the Ecclesiastical Court in favour of Dr. *Bouchier*, was pronounced in *January* 1754; but the respondent and his late wife, did not file their original bill, till *October* 1758, so that near five years intervened without any attempt against the appellants; within which time, Dr. *Bouchier*, relying on the sentence and

the acquiescence therein, had actually made a distribution. In *Trinity Term 1759*, the appellants put in full answers; but the respondent did not reply till *June 1760*, and by this delay, almost another year was lost. After replying, there was a further delay of more than five years, for the respondent did not take one step in the cause, till *October 1765*; and in the subsequent stages of it, there was an unnecessary delay on his part, of more than seven or eight years more. This acquiescence, and these dilatory proceedings on the part of the respondent, were very disadvantageous to the appellants; for in consequence thereof, and of the remote period of time to which most of the material facts of the case related, many of them having happened more than 70 years ago, the appellants would be driven to resort to the depositions taken in the Ecclesiastical Court, instead of having the benefit of *viva voce* evidence; which they could have had, if the respondent had not been so late in first making his claim, and so dilatory in the prosecution of it. Upon the whole therefore, the appellants presumed to hope, that a question which had been tried and decided upon in two instances, once by the Ecclesiastical court, and once by a jury, might now be suffered to continue undisturbed; and that a *personal* property, which had already been the subject of controversy for upwards of *thirty two* years, might at length be quietly enjoyed, without opening the door to further litigation.

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On the part of the respondent it was contended, that the single question in the cause, "Whether *Alice Merchant* was at the time "of the death of *Ann Millington*, her next of kin," was a fact properly and constitutionally to be determined only by a jury; and that as the Court of Chancery would not, in such case, have made a decree, without first directing an issue, and having the point determined at law; so that Court, which has a concurrent jurisdiction with the Ecclesiastical Courts in matters of this nature, ought not to be bound by a sentence of the Ecclesiastical Court, as to the fact of the next of kin, which the Ecclesiastical Court had not the power finally and constitutionally to determine, not being invested with power to direct an issue. And therefore, although the Court of Chancery could not, in case on the trial of the issue a verdict should be found for the respondent, set aside the administration; yet the Court might decree the administrator to be a trustee for, and accountable to the respondent. The sentence pronounced by the Ecclesiastical Court was

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was only in the nature of an interlocutory decree, and not a definitive sentence; for it declared, that the appellant *Bouchier* was the natural and lawful cousin once removed, and as far as appeared to the Court, the next of kin to *Ann Millington*; so that any nearer relation which might afterwards appear, would be entitled to the effects of *Ann Millington*. That as *Walter Jobber*, the surviving executor of *Alice Merchant*, refused to proceed in the appeal, the respondent and his wife had it not in their power to proceed therein, being no parties to the suit in the Ecclesiastical Court; and could therefore only have relief in a Court of Equity. And the decree of the Court of Chancery, insisted on by the appellants answer, ought in no respect to affect the respondent; the question thereby determined, being only as to the heir at law, and not as to the next of kin of *Ann Millington*; and the respondent, or any person under whom he claimed, not being a party to that suit. It was therefore, hoped, that the decree would be affirmed, and the appeal dismissed with costs.

DECREE
reversed.
M. S. Jour.
sub anno 1776.
p. 426.

But after hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the decree therein complained of should be reversed; and that the respondent's bill should be dismissed.

Case 34. *Richard Lee*, Esq; - - - Appellant.

The Right Hon. *George Venables*, Lord } Respondent.
Vernon. - - -

11th March, 1776.

KING *Charles II.* by indenture of lease, dated the 8th of *January* 1661, under the Seal of the Dutchy of *Lancaster*, in consideration of the many good and faithful services done to his Majesty, by *Edward Vernon*, Esq; then one of the gentlemen of his Majesty's privy chamber, did give and grant to the said *Edward Vernon*, the parks of *Hanbury* and *Tutbury*, in the county of *Stafford*; to hold the same from *Michaelmas* 1661, for the

the term of 31 years, at the yearly rent for *Hanbury Park*, of 51 *l.* 5 *s.* 9 *d.* and for *Tutbury Park*, of 35 *l.* 10 *s.*

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By indenture of lease, dated the 8th of *July* 1662, under the Seal of the Dutchy of *Lancaster*, King *Charles II.* granted to Sir *Thomas Morgan*, the said parks of *Hanbury* and *Tutbury*, with the appurtenances; to hold the same from *Michaelmas* 1692 (at which time the former lease granted to Mr. *Vernon* would expire) for a term of 21 years, at the yearly rent for *Hanbury Park*, of 5 *l.* 2 *s.* 6 *d.* and for *Tutbury Park*, of 3 *l.* 11 *s.* And his Majesty did, by the same indenture, grant and assign to Sir *Thomas*, the rents reserved by the lease of 1661.

By indenture of lease, dated the 8th of *July* 1678, under the Seal of the Dutchy of *Lancaster*, reciting the two former leases, and taking notice, that the lease granted to Sir *Thomas Morgan*, was then become vested in the said *Edward Vernon*; King *Charles II.* in consideration as well of 140 *l.* as of many good and faithful services thentofore done to his Majesty, by the said *Edward Vernon*, and in consideration of the rents therein reserved, did give, grant, and demise, unto the said *Edward Vernon*, all that park called *Hanbury Park*, being parcel of his Majesty's honour of *Tutbury*, and Dutchy of *Lancaster*, in the county of *Stafford*; and also all that park called *Tutbury Park*, or the *Little Park*, under the castle of *Tutbury*; and also, all the ground and soil of the said parks, with the herbage and pannage thereof respectively (except timber trees, and woods, mines, quarries, and plaister pits, in or upon the premises, with free ingress, egress and regress, for the using thereof at all times); to hold the same, from the 29th day of *September* 1713 (at which time the former term of 21 years, granted to Sir *Thomas Morgan* would expire) for the term of 63 years, under the yearly rent of 8 *l.* 13 *s.* 6 *d.* payable at *Lady-Day* and *Michaelmas*, by equal portions.

In 1687 the said *Edward Vernon* died, leaving issue, only two daughters, *Mary* and *Elizabeth*, both of whom died without issue, and unmarried.

After the death of the said *Edward Vernon*, the last mentioned lease of *Hanbury* and *Tutbury Parks*, became in 1723, by divers mesne assignments, vested in the appellant's late father, *Richard*

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Lee, Esq; for the remainder of the said term of 63 years, who was accordingly in possession thereof, until the time of his death, which happened in *October* 1748; he left a widow, and the appellant his only son, then about five years old; and by his will, (after disposing of such parts of his real estates as were not settled upon his marriage) he gave all his personal estate to his wife *Apollonia Lee*, and appointed her sole executrix, which she soon after proved in the Prerogative Court of *Canterbury*, and by virtue thereof, entered upon the premises comprised in the said lease, and held the same to the time of her death, which happened in *May* 1763; and by her will she gave to the appellant her son, all the rest and residue of her personal estate, to be paid or delivered up to him, at his age of 21 years, or marriage.

Under this bequest, the appellant enjoyed the leasehold premises in question; which lying in sight of the respondent's family seat, at *Sudbury*, in the county of *Derby*, on the opposite side of the river *Dove*, and being likewise contiguous to the lands and castle of *Tutbury*, held by lease from the Crown, under the Dutchy Seal, the term and interest in which the respondent had purchased; he, in the year 1755, applied in person, to Lord *Edgecumbe*, then Chancellor of the Dutchy of *Lancaster*, and represented to him, that he (the respondent) was the heir male of the said *Edward Vernon*, and in possession of the family seat by inheritance from *Henry Vernon* his great grandfather, and that the said leasehold estates had been disposed of out of the family, by the said *Edward Vernon*, or his representatives, and were very desirable to be enjoyed with the respondents said seat, and therefore the respondent requested of Lord *Edgecumbe*, as a matter of favour, that a reversionary lease of the said parks might be granted to him, to commence on the expiration of the lease then subsisting.

With this request Lord *Edgecumbe* thought proper to comply; and accordingly, by indenture, dated the 12th of *May* 1755, under the seal of the Dutchy of *Lancaster*, his Majesty King *George II.* in consideration of a fine of 200*l.* demised the said two several parks, and the soil and ground thereof, with their appurtenances, to the respondent; to hold the same to him, his executors, administrators, and assigns, from *Michaelmas* 1776, at which time the term of 63 years, granted by the said lease

of 1678, would expire, for the term of nine years and an half, under the several rents following (that is to say), for *Hanbury* Park, the yearly rent of 51*l.* 5*s.* 9*d.* and for *Tutbury* Park, the yearly rent of 35*l.* 10*s.* and which said rents were thereby reserved to be paid at *Lady-day* and *Michaelmas* in the accustomed form. And for this lease the respondent paid 200*l.* by way of fine, and the further sum of 31*l.* 14*s.* 6*d.* for fees and charges.

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In the year 1765 the respondent presented a petition to Lord *Strange*, then Chancellor of the Dutchy of *Lancaster*, praying a grant to him of the said parks and premises for such further term, as together with the terms then subsisting would make up 21 years. And in the years 1766, and 1768, two petitions were presented by the appellant to Lord *Strange*, praying, that a lease might be granted to him of the said parks for ten years and a half, to commence from the 5th of *April* 1786, when the lease now in question would expire, or for such other term as to his Lordship should seem meet.

In pursuance of an order made by Lord *Strange*, the matter of these petitions, on the part both of the appellant and the respondent, came on be heard before his Lordship in the presence of counsel for the parties, on the 8th of *April* 1768, when his Lordship declared, that the tenant right, or Lord's favour of renewal of the lease of the said parks was in the appellant; and his Lordship was pleased to dismiss the petition of the respondent, and to suspend for the present, all proceedings upon the matter of the appellant's petition, so far as the same respected the new leases prayed.

In *Hilary* Term 1773, the appellant filed a bill against the respondent, in the Court of Exchequer, by which he prayed that the respondent might be declared a trustee for him, as to the lease granted in 1755, and might be decreed to assign the same to the appellant, for his own use and benefit; the appellant thereby offering to pay the respondent the fine of 200*l.* and all reasonable expences incurred in obtaining the said lease, together with interest for the same, from the respective times of payment thereof. And as a ground for such relief, the bill charged, that when the said lease was obtained, the appellant was an infant of seven years of age; that the respondent had presented the

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the petition, upon which the said lease was granted by Lord *Edgewumbe*, as Chancellor of the Dutchy, without the privity of the appellant's mother, in whom the possession of the premises then was; that no mention was made in that petition, as usual in such cases, of any term or interest subsisting in another person, nor any notice given to the appellant's mother of the application for such lease, but on the contrary, the whole transaction was industriously concealed from her; and that the petition preferred to Lord *Edgewumbe* for obtaining such lease had unduly stated, that the respondent would have been entitled to the premises, if *Edward Vernon* had not disposed thereof; but the appellant charged, that the respondent was not of kindred to the said *Edward Vernon*.

On the 17th of *April* following, the respondent filed a demurrer to this bill; on the argument of which, two of the Barons were of opinion, that the demurrer should be allowed, and the other two were against the allowance of it; thinking, that the appellant ought to have the satisfaction of an answer to the bill, especially to such part thereof as sought a discovery of facts. And therefore in *May* 1773, the respondent filed his answer to the bill, in which he admitted, that when the said lease was granted to him, the appellant was an infant; and that he did not give notice to the appellant's mother, when he applied to Lord *Edgewumbe* for a grant of the said lease; but the respondent denied that he had industriously concealed the transaction from her, and insisted, that he was not in any respect bound to disclose it to her, or to inform Lord *Edgewumbe*, that the appellant's mother had at that time any interest in the premises demised to him; for that he had been informed and believed, that until Lord *Strange* became Chancellor of the Dutchy of *Lancaster*, no certain rules had ever obtained with respect to granting leases of dutchy lands; but that the Chancellor of the Dutchy for the time being, had always been used to grant leases of estates held thereof, to such persons as he thought fit, without regard, and without giving notice to the lessee or tenants in possession thereof respectively; and though the respondent believed, that previous to the grant of the said lease to him, and after his personal application to Lord *Edgewumbe*, and his compliance with the respondent's desire a petition had been presented to Lord *Edgewumbe*, to the effect stated by the appellant in his bill, yet that

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such petition was prepared as a matter of course, and in compliance with the forms of the office, without the respondent's direction or privity, and to the best of his remembrance was not signed by him; and he declared by his answer, that he never did assert, either to Lord *Edgumbe*, or any other person, that he should have been entitled to the said leasehold premises, had they not been disposed of by the said *Edward Vernon*, nor did he obtain the said lease on any such or the like suggestion, but merely as being heir male of the said *Edward* and *Henry Vernon*, and of the senior branch of the *Vernon* family, and in possession of the family seat and estates in the neighbourhood of the said leasehold premises, and as a matter of friendship from Lord *Edgumbe*, and a favour from the Crown to the respondent, whose relation *Edward Vernon*, originally obtained the grant of the said parks from King *Charles II.* in consideration of many acceptable services, and in particular of money, to a considerable amount, advanced to the King during his exile at *Breda*.

To this answer the appellant replied, and passed publication, but did not examine any witnesses.

On the 24th of *February* 1775, the cause was heard, when the Court was equally divided; the Lord Chief Baron *Smythe* and Mr. Baron *Eyre* being of opinion, that the bill should be dismissed; Mr. Baron *Perrot* and Mr. Baron *Burland* being of opinion, that the respondent should be declared a trustee of the lease in question, for the benefit of the appellant.

In consequence of this equal division, the cause was to have been heard before the Right Honourable the Chancellor, and the Barons of the Exchequer, but before it came on, Mr. Baron *Hotbam* was appointed to succeed Mr. Baron *Perrot*; and the cause was thereupon set down for re-hearing before the Barons only; and coming on accordingly upon the 19th of *June* 1775, the Court were given to understand, that in case Mr. Baron *Hotbam* should be of opinion for the appellant, the cause could receive no decision, the other Barons declaring they had no reason to alter their former opinions, and in case Mr. Baron *Hotbam* should be of opinion with the respondent, that the appellant intended to appeal; the Court therefore, for the sake of expediting the parties, recommended a dismissal of the bill without

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further argument, in order that the appellant might forthwith appeal. And it was thereupon ordered, that the bill should be dismissed, but without costs.

A. Wedderburn.

G. Hill.

F. Hargrave.

Accordingly the present appeal was brought, and on behalf of the appellant it was said to have been long an established practice, to consider those who are in possession of lands under leases for lives or years, as having an interest beyond the subsisting term; and this interest is usually denominated the *tenant-right of renewal*; which, though according to language and ideas strictly legal, is not any *certain*, or even *contingent* estate, but only a *chance*, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in *sales*, and is often an inducement to accept of it in *mortgages* and *settlements*. This observation is more especially applicable to leases from the crown, the church, colleges, or other corporations, and indeed from private persons, where the tenure is of ancient date; and there have been frequent renewals, or, what are in effect the same, successive enlargements of the terms in being, by reversionary grants; and therefore such leasehold property is seldom made the subject of intail or mortgage, without express provisions for procuring renewals. This *tenant-right of renewal*, as it is termed, however *imperfect* and *contingent* in its nature, being still a thing of value, ought to be protected by the courts of justice; and when those who are entitled to its incidental advantages, whether by purchase, or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or *unfair practice* of any kind, it is fit and reasonable, that this injury, which may in many instances be of great extent and magnitude, should have redress; as well as that there should be remedies, when rights more perfect and certain are violated. Accordingly, our Courts of Equity have so far recognized the *tenant-right of renewal*, as frequently to interpose in its favour, by decreeing that *new*, or *reversionary* leases, gained by means or supposition of the *tenant-right of renewal*, should be for the benefit of the same persons as were interested in the *ancient* lease; and that those who procured such new leases, and were legally possessed of them, should be trustees for that purpose. There is a great variety of authorities on this head; but the cases which have hitherto occurred, have principally been of two kinds; some

1. *Cha. Cas.* 191.

1. *Vern.* 276. 404.

pleat Cas.

in Cha. 61.

Ambl. 668.

734. 715. 1. *Vern.*

429. 6. *Bro.*

Just. Cas. 408.

See also *land.*

crown v. Knight

10. May 1734.

in Melm. M.

R. vol. 2. 333.

1. *Bro. Cha. Cas.* 197.

Some being cases of persons not having any *beneficial* interest in the *old* lease, as guardians and executors; and others being cases of persons having only *partial* and *limited* interests, as tenants for life, mortgagors and mortgagees; and in cases of both descriptions, those who have procured a new lease in such situations, have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances; the Court ever presuming, that the new lease was obtained, by means of the connection with, and a reference to the interest in the ancient one, without in the least regarding, whether the persons renewing intended to act as trustees, or merely for their own emolument.

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The appellant's case, however, was not only within the scope of the *general* doctrine, but even seemed a subject peculiarly proper for relief in a Court of Equity. At the time of the respondent's applying for the reversionary lease, which he procured in 1755, the *tenant-right*, or favour of renewal, was clearly in the appellant's mother; and her pretensions to this right or favour were the stronger, because before those under whom she derived her title had bought the situation of Mr. *Edward Vernon*, the original lessee, for the large price of 2800*l.* there had been two successive renewals, and the length of the subsisting lease necessarily led to such a permanent connection with the property, as might well render the Crown particularly disposed to prefer those in possession to mere *strangers*. But of the advantages which might have arisen from a *tenant-right of renewal*, thus strongly recommended by favourable circumstances, the appellant's mother was injuriously deprived, by the *improper* manner in which the respondent solicited the Crown in favour of himself, and by the *false pretences* which were made use of to ensure success to his application. For, that he might appear to have the *tenant-right of renewal*, it was *untruly* asserted in his petition to the Crown, that he was *next of kin* to Mr. *Edward Vernon* the original lessee; the respondent himself now admitting, that he *was not next of kin*, though the allegation of his being so, was the *only* avowed pretension on which he founded his application for the new lease. And, that the attention of the Crown might not be drawn more than was unavoidable, to the *tenant-right of renewal* in the appellant's mother,

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ther, the mention of her name as the lessee in possession was cautiously omitted; and the sale by Mr. *Edward Vernon* to those under whom she claimed, was *obscurely* hinted at, with a generality so artfully expressed, as to produce the effect of a suppression of truth, under the colour and semblance of a full and candid disclosure. Besides, in order to prevent the respondent's application from meeting with any interruption by the appellant's mother, he avoided giving her the least notice or intimation of his design; and from the rapidity with which the grant of the reversionary lease to him was precipitated, it seemed as if the forms of office were made subservient to his views of surprise and concealment. Thus, by *privacy*, *hurry* and *misrepresentation*, the *suggestio falsi*, and the *suppressio veri*, the transaction in every stage and in every part, notwithstanding the palliating colours with which it was attempted to hide imperfection, betrayed its *genuine* form, and attracted observation by all the striking marks of an *unfair proceeding*. Such without doubt it was deemed by the North Auditor of the dutchy, when he framed his report upon the respondent's petition for a *second* reversionary lease, in terms so pointedly explanatory of the unfavourable circumstances, which had attended the grant of the *first**; as such it was still more avowedly reprobated by Lord *Strange*, when, after a solemn hearing, he dismissed the same petition, and declared the *tenant-right* or favour of renewal to be in favour of the appellant. These acts of condemnation operated the more forcibly against the respondent, because they proceeded from persons, whose official situations gave them the best opportunity of knowing how far, in the progress of the respondent's first application, the usual and proper forms had been partially deviated from, or unduly accelerated; and therefore had so much more weight and authority, than the unproved allegations of an interested party, as not to leave room for a competition.

* The substance of this report was, that the premises were held by the appellant, but there being no covenant contained in the lease of the 30th of *Charles II.* for inrolling any assignment in the Auditor's Office, the parties concerned had not inrolled the same, and therefore he could not state them; that the reversionary lease obtained by the respondent in 1755, was granted upon a particular of the premises only, without any previous report; that on perusal of the particular, he found no notice taken, by whom the premises were then held, or in whom the *tenant-right of renewal* was; and that it did not appear to him, whether the then lessee had any previous notice of such grant to the respondent.

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The *unfairness* of the whole proceeding being then *apparent*, what was there to prevent a Court of Equity from extending its arm of protection, in relief of the party injured? The false suggestion *admitted*, the suppression *imputed*, could not be called into the service of the respondent for any other purpose, than misleading the Crown to suppose that *tenant-right of renewal* to be in him, which in fact was, and was now conceded to be in the appellant's mother; and the lease to the respondent being the fruit of this deception, it brought the case not barely within the *spirit* of the *general* doctrine, on which other cases of the same kind have been adjudged, though surely that alone ought to suffice, but even within the very *letter* of it; or to express it justly, more perfectly and fully within the reach of *both*, than any instance which had yet occurred. In most, if not all of the former cases, the Court *presumed* that a *supposition* of *tenant-right* was the means of procuring the new lease, and the foundation of the grant; but in the present case, it was unnecessary to resort to presumption; for the fact of the respondent's thus obtaining the new lease, and of the Crown's granting it, was in evidence, and his own words proved it; the only pretence in his petition for the new lease having been a misrepresentation, calculated to draw a veil over the *real* tenant-right, which existed in the appellant's mother, and in its place to raise the *shadow* of a tenant-right in himself, by the derivation of a pretended proximity of blood. In the other cases, the new lease was simply gained by supposition of a *tenant-right*; but here the new lease was so gained, with all the aggravating circumstances of deception of the Crown which granted, and surprize of the party to whose prejudice that deception was practised: So that the present case seemed to fall as well within the *general* head of fraud and imposition, as within the *particular* doctrine applicable to the ordinary cases of *tenant-right*.

The principal objections urged in favour of the respondent, would admit of the most obvious answers. In order to free himself from the imputation of any intentional misrepresentation, it was said, that the respondent meant to found his pretensions to the favour of a new lease, not as being Mr. *Edward Vernon's* next of kin, but as being his heir male. So far as this explanation merely tended to exculpate the respondent personally, and to preserve his character inviolate, the appellant not only acquiesced

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esced in it himself, but even wished that it might prevail with others; he being anxious for the high rank and dignity of the respondent, and much concerned that any harshness of language should be necessary in the argument of the appellant's case, and wholly indisposed to have such severity in the least extended, beyond the attainment of that justice, which was the object of his suit. But if by this explanation, it should be attempted to influence the point in controversy with the respondent, the appellant must resist its effect. The words *next of kin* in the respondent's petition, apparently referred to the nature of the ancient lease; which being for a term of years, was transmissible to personal representatives, and not to heirs; and therefore required, that the respondent's title should be framed as *next of kin*, in order to give the colour of a tenant-right. Nor was it to be conceived, that the petition was expressed in terms so exactly corresponding to the property, and so peculiarly adapted to insinuate a tenant-right, without design and premeditation; and though the pretensions of the respondent might receive this shape from the officer of the dutchy, who negotiated the business as the respondent's agent; yet the petition being presented by authority from him, he must be responsible for all the incidental disadvantages in point of interest; a construction which he could not consistently complain of as a hardship, so long as he persevered in claiming the consequential benefits. Another objection relied on by the respondent was, that a *privity*, arising from connection of estate, or from some personal trust and confidence, was an essential ingredient in cases of *tenant-right*, hitherto adjudged; and that there was no such privity between the respondent and appellant, they being strangers to each other. But the force of this argument depended partly on supposition; for it does not appear, that all the cases were determined merely on the ground of privity. Besides, if they were, still that ground necessarily involved a principle of decision, which would reach the case now in question. In the case of trustees, and persons having particular interests in the ancient lease, relief is given, because the Court presumes, that such persons, when they procure new leases, obtain them on the supposition of a *tenant-right*; and if they do, they cannot consistently with fair dealing and good conscience, claim the benefit of them, in opposition to those interested in the ancient lease. But the present case was stronger; for the gaining the lease by means of such a supposition was in
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proof, and as that supposition was created by a *false* representation, the circumstances of unfairness, were of a more gross kind, and even brought the case within the general doctrine of fraud and imposition, independently of any aid from the particular cases of tenant-right. It had also been objected, that if the lease to the respondent was procured by fraud, imposition, or any undue practice, the Crown was the party injured, and might avoid the grant. But it was sufficient to observe, on the part of the appellant, that whether the deception which was made use of to obtain the lease, was or was not of such a kind as might entitle the Crown to avoid it; the appellant, and not the respondent, who injuriously assumed his place and situation, ought to have the benefit of the lease, while it was suffered to continue in force.

On the other side it was contended, that such a tenant-right, or claim of renewal as was now insisted on, had not been countenanced or protected, either by the common or statute law of this kingdom, or by any determination of Courts of Equity. Indeed it could not exist, without consequences highly prejudicial to the free enjoyment of leasehold property; without invading the undoubted privilege which every landlord is entitled to, of granting leases to whom, and upon what terms he pleases. A tenant-right in fact, is not any real or valuable interest; it is no more than a right to expect a favour, which may either be totally withheld, or may be extended to another, without injury; and where no injury is done, even though a loss should have been sustained, our law does not furnish any redress. In the present case, there was no ground on which the jurisdiction of a Court of Equity could properly be exercised, in making the respondent a trustee for the benefit of the appellant. Courts of Equity will not declare a trust, where, from the nature of the transaction, there does not exist any. But the claim of the respondent to the lease of 1755 was from the beginning, directly adverse to, and inconsistent with the right of renewal claimed by the appellant. The respondent never acted, or pretended to act, in any degree of trust for the appellant, but obtained the lease in question professedly as a stranger to the appellant, and for his own benefit. If there had been fraud used by the respondent in obtaining this lease, the Crown, who was injured, had a right to resume it. The Crown therefore ought to be a party to this suit, otherwise
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E. Thurlow.
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its rights would be determined, without any opportunity of being heard in defence of those rights.

Should it be objected, that the appellant was an infant when the respondent obtained the lease in 1755, it was answered, that his interest did not commence till the death of his mother in 1763, and consequently he was not entitled to complain of a transaction, which happened while the estate was the absolute property of another, and he was as much a stranger to it as the respondent was, before the year 1755.

But it is said, that the respondent gave no notice of his application for a lease to the appellant's mother; nor did he take any notice of her subsisting term in his petition. There is no rule either of law or equity, which makes notice in such cases necessary. The usage has not been to give such notice, in applications for leases under the Dutchy of *Lancaster*. Before the year 1764, no rule respecting *tenant-right*, ever subsisted as to the Dutchy tenants; nor is there any rule now subsisting, to controul the Crown, or the Chancellor of the Dutchy, in respect to Dutchy leases, or whereby the Crown or its Chancellor is bound to observe or admit a *tenant-right*. The respondent therefore, ought not to suffer for not observing a rule, which had no existence when his lease was granted. The mention of a subsisting term in another, is unusual and needless, because the lessees of the Dutchy are always known to the Chancellor and officers of that Court; the accounts of the receivers and ministers, in which every rent is particularly stated, being yearly passed; and that the subsisting term under the lease of 1678, was known to the Chancellor of the Dutchy, was apparent by the lease itself being recited at large in the respondent's lease of 1755; and the reversionary term made to commence on the expiration of the lease so recited.

It is also said, that the petition presented by the respondent, contained an untrue allegation, which induced Lord *Edgewumbe* to grant the lease; and that the respondent ought not to benefit by his own misconduct. But to this it might be answered, that Lord *Edgewumbe* had consented to grant the lease before the petition was presented, and for reasons not urged in the petition. It was merely to comply with the form of office, and without the respondent's privity, that the petition was presented; and if the

allegation complained of had really any weight, the respondent should rather be declared a trustee for the benefit of the personal representative of *Edward Vernon*, than for the benefit of the appellant.

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After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of affirmed: Without prejudice to any application which the appellant had made, or might make to the discretion of the officers of the Crown, as to the manner of their executing, in this case, the trust reposed in them by his Majesty.

ORDER affirmed.
M. S. Jour.
sub anno 1776.
P. 447.

Sir *John Eden*, Bart. and others, - Appellants. Case 35.

The Right Hon. *John Earl of Bute*, } Respondents.
and others, - - -

18th March, 1776.

IN consequence of the former appeal, and the liberty then given *, the cause was reheard, and the decree affirmed.

* *Ante*, p. 204, 208.

But upon this rehearing, certain leases and other written evidence, and also the depositions of two witnesses, were offered, on the part of the respondents, to *explain* the articles of the 17th of April 1727. This evidence was objected to by the counsel for the appellants, on the ground of there being no such ambiguity in the terms of the articles, as in point of law would admit of being explained by evidence, *dehors* the articles; and more particularly, that deeds made between others, and not shewn to the contracting parties, were inadmissible, as *res inter alios acta*. These objections however were over-ruled, and both the written and parol evidence was permitted to be read.

The appellants conceiving themselves aggrieved by the admission of such evidence, and by so much of the decree as declared,
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that according to the true construction of the heads of agreement, of the 17th of *April* 1727, the lessees right of way-leave and water-course, extended to all the collieries and coal mines in their possession at that time, or which they should afterwards be possessed of during the term; brought the present appeal.

E. Thurlow.
J. Dunning.
Ll. Kenyon.

And on their behalf it was contended, that as to the external evidence admitted to be read, it was conceived to be an established rule of evidence, not to receive parol proof, or any other species of external evidence, to expound the words of an agreement reduced into writing, except where there is some latent ambiguity; as to explain which person was meant, where there are two of the same name, &c. and to determine otherwise, would be to receive the more fallible kind of evidence, to controul that which is least suspicious; and to say, that the writing which the parties meant to abide by, as containing their intentions, should not be so understood. Besides, it should be remembered, that the House of Lords, in the case of *Brown v. Selwin* *, refused, after great debate, to receive parol proof to explain a will, and affirmed the decree of the Lord Chancellor *Talbot*, who had rejected the parol proof; and to determine otherwise now, would be to remove the land-marks of the line of evidence.

Vide Vol. IV.
p. 179.

But further: There were no words in the agreement of *April* 1727, which respected any other coal mines and collieries, than such as the lessees had at the time; or which in any degree described the extraordinary and indefinite liberties, now contended for by the respondents. But if there was any ambiguity in the words of the agreement, the situation of the property of the parties, and the nature and subject matter of the agreement, ought to have induced the construction contended for by the appellants. The coal mines and collieries which the lessees had in 1727, were of great extent, and at that time it was well known, that all of them contained many different seams of coal, and were incapable of being worked out in a short term of years; in fact, many of the seams are still unwrought. It was impossible for these collieries to be won and worked to so great profit of the owners or lessees, except by means of the way-leaves and water-courses demised by the agreement, or the one of them; and it was both reasonable and usual, that the lessor furnishing the case-
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ment, should participate of the profits resulting from it; for in all grants of such liberties as were agreed to be demised by this agreement, the advantages that will arise to the grantees from the same are always considered, and the rent to be paid to the grantor, is in proportion to such advantages. In this light, the rents reserved by the agreement in 1727, were moderate for the liberties granted, even if those liberties were confined to the coal mines and collieries which the lessees had in 1727; but no estimate was then or now capable of being made of the value of such liberties, with respect either to the detriment to be sustained by the lessor, or the advantages to be gained by the lessees, if they could have been supposed to extend to such coal mines and collieries as the lessees might afterwards, during a long term of 98 years, become entitled to. It was well known in 1727, that under every part of Mr. *Davison's* estate, there were coals of a very considerable value; and besides the coal mines and collieries which the lessees then had, there were many other coal mines and collieries of a very great extent, belonging to different persons, lying to the rise thereof; some of which were incapable of being won and worked at all, without the liberties of water-course and way-leave through Mr. *Davison's* estate; and others which could not be won and worked so conveniently, or to so great profit to the owner, without one or both of such liberties; the water of all which collieries, by the extension of a water-course through Mr. *Davison's* estate to them, would necessarily run and flow from those collieries into his estate. If the lessees were to have a right to enjoy the several liberties of way-leave and water-course, in and through the estates of the late Mr. *Morton Davison*, to the extent they contended for, they might, and probably would become the purchasers of most of such coal mines and collieries; and extend, or enable the owners thereof, between whom, and the persons standing in the place of the late Mr. *Davison*, there was no privity of estate or contract, to extend the water-courses made through, and the waggon-ways laid in and over his estates to them, whereby such lessees would receive as great, or greater rents, than by the agreement were made payable; and such owners would have and enjoy great and very valuable advantages, without paying any consideration for the same, and which they could not have had without their aid and consent, and by this means other great injuries would be done to their property; and in particular, the water would be brought down, and must necessarily

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fairly run and flow from all such coal mines and collieries, into the coal mines and collieries of the late Mr. *Davison*, which contained coals won, and capable of being wrought to the profit of the owner, of more than 100,000 *l.* so that the same would be drowned, or so overburthened with water, as to be incapable of being worked at all, or at least without the expence of fire engines. This must have been foreseen in 1727, and in a country where coal mines and collieries are objects of much attention, and a general, durable, and most valuable property, it is not to be conceived, that a gentleman living there would be so inattentive to his own interest, as to agree to make a grant to bind himself and his heirs for 98 years, which might be attended with such very prejudicial consequences. Besides, the power given to the lessees to determine the term at the end of any one year after the twentieth, was a circumstance in favour of the construction contended for by the appellants, no such power being by the agreement reserved to the lessor; and it could only have been inserted by way of caution, that if the coal mines and collieries which the lessees had in 1727, should happen to be worked out before the expiration of the 98 years term, they might not be obliged to pay a rent longer than they enjoyed the use of the liberties; and in this view, the rents made payable during the first twenty years, were moderate for the liberties granted.

A. Wedderburn.
R. Perryn.
J. Madocks.
J. Ord.

On the other side it was said, that the general question between the parties was, Whether the heads of agreement of the 17th of *April* 1727, imported a contract for granting way-leave and water-course, for carrying coals from such collieries as the parties were entitled to, at the date of the articles only; or from such as they then were, and should be entitled to, during the term of 98 years agreed to be granted? The descriptions of the collieries to which the ways and water-courses were to be easements, were in the same form of words throughout the articles, viz. *any of their coal mines or collieries, or any of the coal mines or collieries of the lessees.* Now a contract for an easement, during a certain term of years, to be used in respect of any one species of property of the lessee, imports such property as he shall be possessed of during the term; as a grant of common of pasture for a man's cattle, for a term of years, of itself imports to be for such cattle as shall be his during the term; and cannot be restrained

restrained to such cattle only, as he shall be possessed of at the time of the grant.

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The agreement in question, contained two distinct parts: The first part contracted to grant a lease for 21 years, to be extended by Act of Parliament to 98 years, of way-leaves and water-courses, *over the settled estate*, at a rent of 100 *l.* a year. The latter part contracted to grant a lease for 98 years, of way-leaves and water-courses *over the unsettled estates*, at the rent of a peppercorn for the first ten years; 100 *l.* a year for the next five years; and 200 *l.* a year for the remainder of the term; with a proviso, that if, within the first fifteen years, the lessees should lead any coals over any of the estates of Mr. *Davison*, either settled or unsettled, *from any other collieries than those which they then held by lease from the lessor*, they should from thenceforth pay the rent of 200 *l.* a year. It was clear therefore, the parties intended, that during the whole term, the lessees should have a right, on paying 200 *l.* a year, *of leading coals from any other collieries besides those held of the lessor*; and no distinction was made between collieries which they were then possessed of, and collieries which they should afterwards acquire; although this part of the agreement called for such distinction to be made, if any was intended. And this construction of the agreement made the whole consistent, and agreed with the expressions used in every part of the articles. It was further said, that the articles which created the partnership between the lessees, and were dated in 1726, were to continue for 99 years; and the contract with Mr. *Davison* in 1727, was for 98 years; which plainly shewed it to be the intention of the partners, that their contract with *Davison* should have a reference to their articles of partnership; one object of which was expressed to be for the purchasing, taking, and working of collieries during the term; so that to suppose, that the contract with Mr. *Davison* referred only to collieries which the lessees were then possessed of, was to suppose, that they made a contract inconsistent with the whole design of their partnership. An agreement so confined, and made by a partnership who had in view the increasing the number of their collieries throughout the term, would have been weak and improvident, in the then situation of the partnership; as the collieries *of which they were then possessed*, and for which they wanted any way-leaves or water-courses, over or through the grounds of Mr. *Davison*, were such as might have been worked out in 20 years.

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As to the *particular* grievance alledged by the appellants, that much evidence both written and parol was admitted to be read on the part of the respondents, in explanation of the written agreement of *April* 1727, which was objected to as inadmissible; it was said, that in order to judge whether a Court of Equity ought to decree a specific execution of the agreement, and in what manner it was to be executed, it was necessary to shew the interest of the parties, the state of their property at the time of the agreement, and the subject matter upon which the contract was to operate. For these purposes, the partnership articles, which were stated in the bill, were read; the leases of such collieries as the respondents had at the time of the agreement, and of such as they afterwards acquired, were read; and parol evidence was also read to shew the conduct of the parties, both prior and subsequent to the agreement: These acts being material to be known, in order to discover the end of entering into the agreement, to point out how the parties themselves understood it, and to direct what covenants and provisions ought to be inserted in the form of the instrument, which was to carry the contract into compleat execution. This evidence was therefore proper to be received by the Court, and it was apprehended the Court did right in receiving it.

DECREE
affirmed.
M. S. Jour.
sub anno 1776.
p. 505.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

Case 36. The Reverend *Samuel Rogers*, Clerk, Appellant.

Thomas Holled, Knightley Holled, Clerk,
Thomas Smith, and the Right Reverend } Respondents.
John Lord Bishop of Lincoln, }

2d May, 1776.

2 Black.
Rep. 1039.

THE Respondent *Smith* being, in 1763, entitled in fee to the advowson of the rectory and parish church of *Husband's Bosworth*, in the county of *Leicester*, whereof *Edward Colquhoun*, clerk,

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clerk, was then incumbent, employed the respondent *Thomas Holled*, an attorney at law in that neighbourhood, to sell the same to the best advantage, which he undertook to do; but instead thereof formed a design of secreting the true value thereof, and of purchasing the same for himself at an under value; and by letter of the 2d of *July* 1763, acquainted Mr. *Smith*, that he had but one friend who bid for it, that he offered 500*l.* and no more; and that in all probability he (*Smith*) could not get a better price for it, although the rectory was at that time worth to be sold, subject to the life of the then incumbent, for 2000*l.* or more, in the uninclosed state of the Lordship; and would be worth double that sum in case an inclosure should take place, which was then intended by the proprietors of the lands there, and an attorney at law was actually employed by them, to solicit an act of Parliament for that purpose, and to apply to Mr. *Smith* for his consent, yet the respondent *Thomas Holled* prevailed on such attorney to postpone that application for a fortnight or three weeks; and Mr. *Smith* living at a great distance from the rectory, and being unacquainted with the value thereof, as well as with the intended inclosure, and in very distressed circumstances, and out upon bail on an arrest for a just debt of 300*l.* the respondent *Thomas Holled* took advantage thereof, and renewed his assurances, that the advowson, was worth no more than 500*l.* or 500 guineas, and thereby prevailed on him to execute conveyances, by lease and release, dated the 7th and 8th of *February* 1764, of the advowson, to the said *Thomas Holled* and his heirs, for the consideration of 525*l.* notwithstanding *Holled* could not but have been informed before that time, that the advowson, though the Lordship had continued uninclosed, was of the value of 2000*l.* or more; and besides, must before the conveyances were executed, or the advowson contracted for by him, have known that an inclosure of the Lordship was then agreed upon, and the terms thereof absolutely settled between the proprietors and the incumbent; and that all or almost all the proprietors had before that time signed a petition to the House of Commons, for leave to bring in a bill for inclosing the said lordship, and such petition was, on the 24th of *January* preceding the execution of the said conveyances, presented to the House of Commons, and a bill then ordered to be brought into that House pursuant to such petition; and that there then was not any prospect of the least opposition to such bill, and in fact there was none; for the same soon afterwards passed both Houses of Parliament,

and

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and received the royal assent, on the 19th of *April* following, and thereby the advowson, subject to the incumbent's life in the rectory, became of the value of 4000 *l*.

The respondent *Smith*, having discovered that he had been greatly deceived and imposed upon by the respondent *Thomas Holled*, did, in *Hilary* Term 1765, exhibit his bill in Chancery against him, stating the several facts abovementioned, and praying, that the said conveyances might be set aside for fraud, and that the rectory might be reconveyed to him: To which bill the respondent *Thomas Holled* put in his answer, and thereby insisted on the validity of his purchase.

In *October* 1765, the incumbent died, and thereupon *Smith* did, by writing signed by him, duly present the appellant to the said church, who attended the respondent the Lord Bishop of *Lincoln* (the diocesan) with the said presentation, and prayed admission, institution, and induction thereon; but *Holled* soon afterwards presenting his brother, the respondent *Knightley Holled*, to the said rectory, and several writs of *quare impedit* and *ne admittas* being served on his Lordship by the several claimants, he refused to admit either of the presentees.

The respondent *Smith* afterwards amended his original, and filed a supplemental bill, and made the said *Knightley Holled* and the bishop parties thereto; and the respondents *Thomas* and *Knightley Holled* afterwards filed a cross bill against the respondent *Smith* and others; to which several bills, answers were afterwards put in by the several defendants thereto, and the said causes were brought to issue, and witnesses examined on both sides, and publication of the depositions taken in town passed in the original cause, which was set down to be heard before the Lord Chancellor; and there being sufficient proof therein that the respondent's purchase was fraudulent, the appellant hoped to have had the benefit of his presentation; but false representations of the depositions in the original cause, having been made to the respondent *Smith*, and he being thereby intimidated from proceeding in that cause, *Thomas Holled* took advantage thereof, and thereby, and by other fraudulent practices, again imposed and prevailed on him to execute an indenture, dated the 12th of *December* 1769, whereby, after reciting, that divers proceedings had

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had been had in the said causes, and that by the advice of friends, the said *Thomas Smith* had, for settling all disputes, agreed that he should discontinue his action of *quare impedit*, and dismiss his bill in Chancery, and do such other acts as should be necessary for establishing the said *Thomas Holled*'s title; and in consideration whereof, the said *Thomas Holled* had agreed to dismiss his said cross bill, and immediately to pay *Smith* 1050 *l.* and also his costs, both at law and in equity, together with the costs of the appellant; the respondent *Smith* did, in consideration of 1050 *l.* paid by the said *Thomas Holled*, grant, bargain, sell and confirm to him, his heirs and assigns, the said advowson, together with the glebe lands, tenements, tithes, oblations, hereditaments and appurtenances thereunto belonging, and the rents, issues, and profits thereof: Which said indenture (except as to the consideration money, for which a blank was left) had been previously prepared by *Thomas Holled*, or his agent in all his law affairs, without the privity of the respondent *Smith*; and upon or immediately after the execution thereof, the respondent *Smith* signed a letter to the Bishop of *Lincoln* in the words following, viz.

“ My Lord,

“ Whereas all suits at law and in equity are now ended between me and *Thomas Holled*, touching the advowson of the church and rectory of *Borefworth*, otherwise *Husband's Bosworth* in the county of *Leicester*, and as I have by a certain indenture of bargain and sale and confirmation, bearing even date herewith, duly executed and acknowledged by me, in order to be inrolled in the High Court of Chancery, confirmed the title of the said *Thomas Holled* and his heirs, of, in and to the said advowson and rectory; Now I do hereby, as far as in me lies, recall and make void my presentation of the Reverend *Samuel Rogers*, Clerk, to the same, and I do further therefore hereby humbly request your Lordship, to deliver up the said presentation by me given to the said *Samuel Rogers* to the said *Thomas Holled*, his solicitor or agent, to the intent, that the same may be destroyed, and to accept, instead of the said *Samuel Rogers*, the Reverend *Knightley Holled*, (now Doctor of Divinity) and to institute or cause him to be instituted and inducted to the church and rectory in question forthwith, all proceedings in the *quare impedit* by me brought against your Lordship, being by my consent and approbation discontinued.”

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Upon the execution of the indenture of bargain and sale, and the said letter to the Bishop, the respondent *Holled* paid Mr. *Smith* 630 *l.* and gave him a note or other security for 420 *l.* in discharge of the 1050 *l.* the consideration money in the indenture mentioned. But a suit was afterwards instituted in the Court of Chancery, between the said *Thomas Smith* and *Thomas* and *Knightly Holled*, for setting aside the said indenture of bargain and sale for fraud and imposition.

In *Hilary* Term 1770, the appellant filed his bill in the Court of Chancery against the respondents, stating the several facts before mentioned, and praying, that the said conveyances might be set aside for fraud, and that the appellant might have the benefit of his presentation to the said rectory, and be instituted and inducted into the same, and that the money in the hands of the sequestrators of the rectory might be paid to him.

The respondents *Thomas* and *Knightley Holled* put in their answers to this bill, and the respondent *Thomas Holled* thereby admitted, that he was employed as attorney and agent for the respondent *Smith*, to enquire into the value of, and to sell the said advowson; but alledged, that he had done so, and could get no more than 500 *l.* for the same, and insisted on his purchase thereof, at the sum of 525 *l.* and also on the second conveyance, for the further sum of 1000 guineas and costs. And the respondent *Knightley Holled*, by his answer, claimed to be entitled to institution and induction into the rectory, as well by virtue of the original presentation by the respondent *Thomas Holled*, as of the abovementioned requisition of the 12th of *December* 1769.

The respondent *Smith* also put in his answer to the appellant's bill, admitting the material facts stated therein, and alledging, that at the time the appellant was presented by him, he had, as he believed, good right to present him, and that therefore the appellant ought to have the full effect and benefit of his presentation, and that he had no objection thereto in case the Court should decree the same.

The Bishop also put in his answer, and thereby submitted to act as the Court should direct.

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The cause being at issue, and witnesses examined, and publication passed, came on to be heard before the Lord Chancellor *Bathurst*, on the 6th of *March* 1775, when his Lordship was pleased to order, that a case should be made for the opinion of the Judges of his Majesty's Court of Common Pleas, on the following question; "Whether the said letter or instrument be a good and effectual revocation of the presentation in law?"

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A case was accordingly made, and the Judges of that Court, on the 15th of *November* 1775, certified their opinion; "that the said letter or instrument was a good and effectual revocation of the presentation in law."

In consequence of this certificate, the cause was again brought to hearing for further directions, on the 3d of *February* 1776, when his Lordship, on the foundation of the said certificate, was pleased to order (as is usual in the like cases) that the appellant's bill should stand dismissed, but without costs to any of the respondents, except the Bishop, who was to be paid his costs by the appellant.

From this decree Mr. *Rogers* appealed; and on his behalf it was argued, that the title to the advowson of the rectory in question, was, before the execution of the deeds of *February* 1764, in the respondent *Smith*, and was admitted by all parties to have been so. The gross fraud in obtaining those deeds, so manifestly appeared from the facts above stated, all which were clearly proved in the cause, that the whole transaction must be esteemed fraud apparent; and in such a case, the constant practice of Courts of Equity is, to set aside the conveyances, without directing a trial at law, and to order them to stand as a security only for the money advanced, and interest. But if there was any doubt, whether that transaction was fraudulent or not, as it stood originally, that doubt was removed by the respondent *Thomas Holled's* afterwards giving a further sum of 1000 guineas, besides agreeing to pay all the costs of various suits both at law and in equity; which was the strongest admission on his part, of the fraud and invalidity of his title under the conveyance of 1764. Conveyances obtained as that was, are considered in equity, in the same light as mortgages, so far as to secure the repayment of the consideration money and interest; but in all other respects are

A. Wedderburn.
G. Hill.

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are much less favoured. The established practice of Courts of Equity, in restraining mortgages of advowsons from presenting, is founded on clear reasons, applying with equal force against a claim to present by virtue of a conveyance in terms absolute and irredeemable, but attended with circumstances changing its equitable operation, to a security for the money advanced, and interest; and it would be a strange reverse of the rules of equity, to allow a privilege to persons obtaining by fraud, securities on advowsons, or conveyances operating as such, which is denied to those who obtain them without fraud, or any other imputation whatever.

But it was said, that the appellant's claim was founded on the presentation of the respondent *Smith*, which was afterwards revoked by the instrument of the 12th of *December* 1769. That instrument however was not a revocation of the former presentation, because a presentation to an ecclesiastical benefice, being once duly made by any subject as patron, is not revocable by such patron; especially after the same has been delivered by him to the presentee, who has therewith attended the diocesan, and duly prayed admission, institution, and induction thereon. It is true, the opinions of judges on the general question, whether a presentation is revocable or not, are inconsistent; but the strongest reasons are against a revocation in general. Admitting however, that a presentation is in general revocable by a patron before institution; yet, under the circumstances of this case, the instrument of the 12th of *December*, 1769, was not a revocation of the former presentation; 1st, Because it appeared by the recitals in that instrument, that the motive or consideration for making it, was the deed of bargain and sale executed immediately previous thereto; which deed was obtained for an inadequate consideration, and by false representation of the depositions in a former cause; and therefore that instrument was fraudulent and void, and could not revoke the former presentation fairly obtained. 2dly, But supposing the bargain and sale not to be fraudulent and void, then the respondent *Smith*, on that supposition, was not patron at the time he executed the instrument, having before conveyed away the advowson, and therefore could not then have that or any other power incident, or supposed to be incident to the right of patronage; and though the right of presentation on the then vacancy, or the power of revoking the former presentation, were

choses in action, and as such not assignable by law, and therefore could not pass by the indenture to the bargainee, yet the bargainor could not claim the same against his own conveyance; and consequently, the right of revocation, if any then subsisted, must be extinct by that conveyance. But further; this instrument was obtained when the church was vacant, and under a corrupt and simoniacal agreement, as appeared by the proofs in the cause, and by some recitals in the instrument itself; therefore it was by the express words of the statute, 31 *Eliz.* c. 6. *utterly void, frustrate, and of none effect in law*; consequently it could not operate as a revocation, for if it could, it would be of some effect in law, which is contrary to the express words of the statute.

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It was nevertheless objected, that a presentee has not, before institution, either *jus in re*, or *ad rem*, and consequently was incompetent to maintain any suit either in law or equity. But it was submitted, that the relief contended for fell within the general rules of equity. A presentee before institution, has a right to maintain a suit in the Ecclesiastical Court by *duplex querela*, and may thereby obtain institution and induction, therefore he has *jus ad rem*, though not *in re*. This remedy properly lies, where the parties contending for institution, claim under the same patron, which was the present case; for the respondent *Knightley Holled* expressly claimed under the presentation of *Smith*, as well as that of *Thomas Holled*, and if he had claimed only under *Thomas Holled*, yet as he neither had or pretended to have any title to present, but what was founded on the fraudulent conveyance of 1764, and as the Court of Chancery has an original jurisdiction to relieve against fraudulent conveyances, the appellant was well entitled to the relief prayed by his bill, and ought not to be sent to another jurisdiction; and the rather, as the Bishop had, by his answer, submitted to the jurisdiction of the Court. It was apprehended, that not only the person from whom a deed is fraudulently obtained, has a right to the aid of a Court of Equity for setting the same aside, but that any person affected thereby has the same right, at least so far as his interest is concerned; and consequently, that the appellant had a right to maintain the present suit *pro interesse suo*; especially as the respondent *Smith* was made a party to it, and as no objections had been or could be made against the appellant's having the be-

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nefit of his presentation, but such as were founded on the fraudulent and unwarrantable practices of the *Holleds*; and as no relief could be had against them at the common law, or in any Ecclesiastical Court, the appellant's case was properly cognizable and relievable in a Court of Equity.

E. Thurlow.
N. Grose.
J. Brown.

On the other side it was contended, that a presentation by a lay patron, before institution, is only a letter missive to the Bishop, recommending the person presented, and confers no interest whatever. That the cases proving that any interest is conferred by the presentation of a lay patron, were founded on the citation of a case determined, 31 *Edward I.* but this citation seems to have been totally misunderstood by *Fitzherbert*, in his *Natura Brevium*, and from him copied by some few subsequent reporters, without examining the year-book itself; which proves the proposition above laid down, and clearly appears understood to do so, by the current of the best authorities, from that time to the latest decision upon the point; which being now in the fullest manner recognized by the Court of Common Pleas, the very attempt to shake a doctrine so established, was of the most dangerous consequence. There was no circumstance in the present case, which could in any wise affect this general doctrine; for the instrument in question was fairly obtained, and properly executed; and if there was a foundation for the most remote suspicion of simony in any part of this transaction, it was more applicable to the appellant, than to either of the *Holleds*; and therefore created an additional incapacity in the appellant to maintain this suit. The appellant being thus clearly without a shadow of right to the living in question, he ought also to be without remedy; and therefore the dismissal of his bill, was a necessary consequence of the judges certificate.

DECREE
reversed.
M. S. Jour.
sub anno 1776.
p. 890.

After hearing Counsel on this appeal, the following question was put to the Judges, viz. "Whether, supposing the deed of 1764 to have been fraudulently obtained, the deed and letter of the 12th of *December* 1769, for the additional consideration of 1050*l.* and costs in law and equity in the causes then depending between the said *Thomas Smith* and *Thomas Holled*, paid to the respondent *Smith* after the church became vacant, is in law a good revocation of the presentation of the appellant by the respondent *Smith*?" And the Lord Chief Baron

Baron having delivered the unanimous opinion of the Judges present, that it was not in law a good revocation; it was DECLARED, that supposing the deed of 1764 to have been fraudulently obtained, the deed and letter of the 12th of *December*, 1769, was not in law a good revocation of the presentation of the appellant by the respondent *Smith*; and it was therefore ORDERED and ADJUDGED, that the decree complained of should be reversed; and that the cause should be remitted back to the Court of Chancery, to do therein as should be agreeable to law and justice*.

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Alexander Elliot and Others, - Appellants. Case 37.

William Wilson and Company, - Respondents.

25th November, 1776.

THE harbour of *Carron*, situate near the head of the *Firth* of *Forth*, is chiefly resorted to by ships in the service of the *Carron* Company, who have a great iron work and considerable collieries in the neighbourhood. From thence vessels intended principally to convey the manufactures of the Company, their coal and such goods as may be offered them on freight, sail periodically for *Hull*, and other places on the Eastern coast of *England*. This is a coasting or carrying trade, the vessels in going down the *Firth* touching at different places to take in additional loading, or to discharge part of what they have received at places higher in the river. Particularly, it is usual for these vessels to call at *Borrowstonefs* and *Leith*, and at *Morrison's Ha-*

* Accordingly on the 28th of *April* 1777, the cause was again heard, when the Lord Chancellor declared, that the deed of the 8th of *February* 1764, was fraudulently obtained; and therefore, that the deed and letter of the 12th of *December* 1769, was not in law a good revocation of the presentation of the plaintiff to the living in question: And it was ordered, that the plaintiff should be at liberty to apply to the Bishop of *Lincoln*, for institution and induction to the said living. And it was further ordered, that the plaintiff should pay to the Bishop of *Lincoln* his costs of the suit, but as between the rest of the parties, his Lordship did not think fit to give costs on either side.

Reg. 1776.
Lib. B.
P. 522.

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ven, a port six miles further down the *Firth*, and on the same side with *Leith* in the bay of *Prestonpans*.

In *February* 1774, the respondents had occasion to ship fourteen hogheads of tobacco on board one of these vessels for *Hull*, and desiring to insure them, gave the following instructions in writing to *Hamilton* and *Bogle*, insurance brokers in *Glasgow*, "Please to insure for our account by the *Kingston*, " *George Finlay* master, from *Carron* to *Hull*, with liberty to call " as usual, fourteen hogheads of tobacco;" and these instructions were entered in the brokers books for the perusal of the underwriters, as is the practice at *Glasgow*.

Upon the 9th of *February*, the appellants underwrote a policy of insurance in these terms, "Beginning the adventure of the " said tobacco, at and from the loading thereof on board said " *Kingston*, at *Carron* Wharf, and to continue and endure until " said *Kingston*, (being allowed a liberty to call at *Leith*) shall " arrive at *Hull*, and there be safely delivered.

The respondents were not privy to the allowance to call at *Leith*, being thus substituted in the policy, for the more general term, *as usual*, mentioned in their instructions to the broker. The premium agreed on was 1 *l.* 5 *s.* per cent. a rate equal at least, if not higher than was in use to be given on the voyage, in cases where it was understood, or expressed in the policy, that the vessel might touch at the customary ports. And in particular, some of these appellants, in *February* 1772, underwrote a policy upon this very vessel, and for the same voyage, with liberty to call at *Leith* and *Morrison's Haven*, at a premium of 1 *l.* per cent. only.

The vessel thus insured had sailed from *Carron* five days before the date of the policy, that is on the 4th of *February* 1774, it did not call or touch at *Leith*, but put into *Morrison's Haven*; set sail from thence on the 9th; got safe into the direct course from *Carron* to *Hull*; cleared the *Firth* of *Forth*, and proceeded with a fair wind, till on the evening of the 10th, the vessel being overtaken by a storm at *Holy Island*, on the coast of *Northumberland*, was wrecked, and the cargo totally lost. All these were facts admitted, nor was it alledged by the appellants, that the

the ship received the smallest damage, in going into or coming out of *Morrison's Haven*.

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Intelligence of this misfortune reached *Glasgow* on the 14th of *February*, when the respondents for the first time saw the policy of insurance, or understood that it differed in terms from their instructions to the broker in whose hands it remained. It did not however occur to them, that this slight variation would afford a handle to the underwriters for refusing payment; nor does it seem to have then occurred to these gentlemen, who immediately wrote to the respondents, desiring they would request the *Carron* Company to give the necessary orders for preserving the tobacco, and forwarding it to *Hull*, promising to contribute towards the expence, so far as they were interested.

After this seeming acquiescence, the respondents were not a little surprised, when, upon the 24th of *February*, a protest was taken against them by all the underwriters in person, attended by a notary public and witnesses; in the instrument which they caused the notary to draw up and sign on that occasion, they were pleased to give the following account of the matter: "Upon *Wednesday* the 9th of *February* current, a policy was offered to the said *James Coulter*, *Alexander Elliot*, *Robert Carrick*, *Andrew Dunlop* and *Henry Ritchie*, in the office of *Archibald* and *Gilbert Hamilton*, insurance brokers in *Glasgow*, for their underwriting as insurers on goods, for account of the said *William Wilson* and Company, on board the ship *Kingston*, Captain *Finlay*, from *Carron* shore to *Hull*, with liberty to touch as usual. Upon requiring the broker to explain what he meant, by touching as usual, he said he meant a liberty to stop at *Leith* Road or Harbour, for a short time, in case any passengers or goods were expected from that place, and upon enquiring the advices about the time of sailing, he said that he was informed, the vessel had sailed the *Saturday* before, being the 6th of *February* current. In these circumstances the said *James Coulter*, and the other persons aforesaid, were satisfied with the conditions of the voyage, and signed the policy, which contains a liberty to touch at *Leith*, and no where else, and as the wind and weather were favourable from the *Sunday* to the *Wednesday*, they had good reason to conclude, the vessel would make a safe and speedy passage

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“ passage to *Hull*. But being now well informed, that instead
 “ of prosecuting the voyage described in the policy, the said ship
 “ *Kingston*, was designedly carried into the port of *Morrison's*
 “ *Haven*, near *Prestonpans*, where she staid four or five days,
 “ having really failed on *Friday* the 4th current, taking in a
 “ large quantity of a very dangerous commodity, viz. sulphur;
 “ and from which port of *Morrison's Haven* she did not depart
 “ till the 9th of the month, and was the next day wrecked near
 “ *Holy Island* in her way to *Hull*; which misfortune was en-
 “ tirely owing to her stay in that harbour, whereby she lost many
 “ days of the most favourable winds and weather, which would
 “ have compleated her voyage in safety, in place of meeting
 “ with a change of wind and storm of snow, which occasioned
 “ her shipwreck; and the said underwriters would not have
 “ underwritten upon the said policy, if they had known the
 “ vessel had been to call at *Morrison's Haven*, and take in an ad-
 “ ditional cargo: Wherefore the said *James Coulter*, *Alexander*
 “ *Elliot*, *Robert Carrick* and *Andrew Dunlop*, for themselves,
 “ and as procurators for the said *Henry Ritchie*, did and do pro-
 “ test, that this plain deviation, contrary to the express stipula-
 “ tion in the policy, must, according to the constant practice of
 “ merchants, render the policy null and void, and therefore
 “ they hold themselves to have no further concern in the goods
 “ insured.”

The appellants persisting in their refusal, and an arbitration entered into having ended without any award, the respondents were obliged to bring their action against the appellants for payment, in the Court of Admiralty in *Scotland*, the only competent Court for determining questions about insurances, and other maritime affairs in that country, in the first instance. At the same time the respondents brought separate actions against the brokers, for having without orders taken the policy in terms different from the instructions; and against the *Carron Company* as freighters of the vessel, on the ground of not having informed the respondents of an intention to call at *Morrison's Haven*; both these actions concluding against the several defendants, only in the event of the underwriters being acquitted.

The appellants put in their defences, which were followed by other pleadings of the parties, and on the 6th of *January*

1775, the Judge Admiral pronounced the following interlocutor: "Having advised process, and the defences for *Alexander Elliot* and others, with the answers made thereto for *William Wilson* and Company, merchants in *Glasgow*, pursuers, and the replies and duplies, and the policy of insurance produced and libelled on, and the other writs produced; and having considered the whole circumstances of this case, and in particular that it is not alledged by the defenders, that the pursuers were in the knowledge of the ship the *Kingston* being intended to put into *Morrison's Haven*, repels the defence pled by the defenders."

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The appellants reclaimed against this interlocutor, and answers being put in to their petition, the Judge Admiral, in regard they set forth and seemed to found on conversations between them and the brokers, at the time of underwriting, or settling the terms of the policy, "allowed them to bring proof of what passed at and previous to making the insurance." But the appellants presented a second petition, declining to go into any proof, insisting that the cause turned singly upon the words of the policy, and demanding judgment on the abstract question, whether the vessel touching at *Morrison's Haven*, when not allowed by the policy, discharged the underwriters? Whereupon the Judge, by interlocutor dated the 7th of *April* 1775, again decreed in favour of the respondents.

The appellants then sued out a writ of suspension from the Court of Session, of these sentences of the Judge Admiral, and after the usual preliminary step of procedure before the Lord Ordinary, the cause being reported to the whole Lords, their Lordships, having before them the opinions of several of the most eminent merchants, both in *England* and *Scotland*, gave judgment for the respondents on the 23d of *January* 1776, in the following terms; "Having advised informations, *hinc inde*, and considered the policy of insurance and whole circumstances of the case, the Lords repel the reasons of suspension, find the letters orderly proceeded," (*i. e.* that the appellants were obliged to pay the sums underwritten, in terms of the Judge Admiral's decree) "and decern."

The appellants having reclaimed against this interlocutor, the following judgment was, on the 7th of *March* 1776, pronounced

1776.

nounced by the Court, "The Lords having advised this petition with the answers, they find the suspenders severally liable, to the chargers, in payment of the respective principal sums and interest thereof decerned for and underwrote by them; and also find them conjunctly and severally liable, in the expence of the extract of the decreet before the Admiralty Court, as the same shall be certified by the Clerk of the said Court; and in so far find the letters orderly proceeded, and adhere to the former interlocutor; and as to all other expences found due by the Admiral, they suspend the letters *simpliciter*, and decern and find the suspenders liable in the expences of the extract before this Court, as the same shall be certified by the collector of the clerk's dues, and decern, and find no other expences before this Court due."

J. Dunning.
A. Macdonald.

From these several interlocutors, the present appeal was brought; and on behalf of the appellants it was contended, that a wilful deviation from the due course of an insured voyage, is in all cases a determination of the policy; from that moment the engagement between the insurers and insured is at an end; and it is immaterial from what cause, or at what place, a subsequent loss arises, the insurers being in no case answerable for it. The going into *Morrison's Haven*, was a wilful deviation from the due course of a voyage from *Carron* to *Hull*; and though it may be true, as contended on the part of the respondents, that ships sailing through the *Firth of Forth*, have sometimes been permitted by the terms of a policy, underwritten at the same premium as the present, to go into this port, it would not avail them in the present case, since this policy gave no such permission. The respondents appeared by their instructions to their broker to have been aware, that the going without permission into any port but that of their destination, would be a deviation; and the broker, finding it difficult to get a policy underwritten on any other terms, thought fit to restrain the liberty of calling, to the port of *Leith*. But independent of what passed between the broker and the underwriters, before their signing this policy, it was submitted, that a policy penned like the present, giving liberty to call at one port, excluded every claim to a liberty of calling at any other.

E. Thurlow.
A. Wedderburn.

On behalf of the respondents it was said, that what the appellants called a deviation in this case, could not have the effect of

of vacating the policy, there being neither an increase, nor a difference of risk; for the voyage as actually made, was one and the same chance with that insured against, even taking the policy in the strict sense contended for. The appellants indeed, to give a colour to their plea, by the appearance of a different risk, argued that the loss was occasioned by going into *Morrison's Haven*; for had there been no interruption of the course from *Carron* to *Hull*, the vessel would have escaped the storm which overtook it at *Holy Island*. But as the vessel was allowed to call at *Leith*, without any limitation of the time of staying there, the risk of the voyage being prolonged by calling at a port in the course of it, was clearly undertaken by the insurers; and it made no difference of hazard, whether that port was *Leith*, or *Morrison's Haven*; policies of insurance are to be construed largely, and for the insured; a rigid adherence to literal terms has been deservedly reprobated in Courts of Law, and among merchants. Every voluntary deviation from the direct line has not the effect to discharge the underwriters, it being sufficient if the voyage is *according to usage*. But the appellants argument went even farther than literal interpretation, for they would construe "liberty to call at *Leith*," as a direct prohibition to call any where else; though the juster and more natural conclusion was, that had such prohibition been intended, it would have been expressed; and as it was not disputed, that vessels in the trade from *Carron* to *Hull*, usually touch at *Morrison's Haven*, and that this consisted with the knowledge of the appellants, the voyage, *as made*, was according to usage, and within the intent of the policy. The appellants were not at liberty to deviate from the respondents instructions shewn to them, but ought either to have kept to the precise terms of those instructions, or not have signed the policy at all; especially when they were told, that the vessel had previously sailed. If their plea now was not affected, their conduct then was insidious and wrong; and as, by their silence, the respondent was led to believe himself secure in all events, they were in equity obliged to make good his loss.

Like most other questions arising from insurance, the present fell to be judged upon equitable principles, resulting from the special circumstances of the case; and when all circumstances here were considered, the plea of the appellants must be deemed an attempt to evade payment, equally illiberal and ineffectual.

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An express allowance to call at one port being given, the vessel passed it and touched at another, only six miles farther down the river, and in the course of the voyage insured. The alleged deviation, was singly the act of entering *Morrison's Haven*; for the vessel's sailing close by it never could have been so termed, so near was it to the direct course of the voyage; and nothing being more common, than to tack from one shore to the other in going down the *Firth*; calling at *Leith*, or at *Morrison's Haven*, was but the difference of a name, for the time of staying at the port mentioned in the policy was not limited. The risk was not greater, as it is allowed by every person acquainted with the coast, that *Morrison's Haven* is even a safer and more accessible harbour than *Leith*; and in fact, no damage was sustained by the deviation, the vessel having regained the direct course to *Hull*, and being wrecked after proceeding in it several leagues. But further: The words in the policy, whatever the appellants now affected to understand by them, seemed to have been used as synonymous with those in the respondents instructions to the broker. The appellants admitted having seen the instructions, and asked the broker what was meant by *calling as usual*. The words inserted in their place, could not be intended to limit the more general term, because the insured were neither masters of the vessel, nor had any direction or knowledge of the precise course of the voyage; and because it was understood by all the parties concerned, that the vessel had sailed from *Carron*, three days at least before making the insurance, and consequently might be in some other port at that instant, as it actually was; a circumstance which it was not impossible for the underwriters to be acquainted with. It was evident therefore, that the broker could not possibly mean to make the policy void, in case the vessel had called, or might call, at the other usual places besides *Leith*; and if the appellants tacitly entertained such an idea, having the instructions before their eyes, being acquainted that the vessel had already sailed, knowing the usage, and taking the accustomed premium, they were guilty of a fraud, from which they could not be allowed to reap any advantage.

Interlocutors
reversed.
M. S. Jour.
sub anno 1777.
P. 105.

But after hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the interlocutors complained of should be reversed: And it was DECLARED, that the respondents were entitled to a return of the premium, paid by them to the appellants:

lants: And it was therefore ORDERED and ADJUDGED, that the appellants should pay, or cause to be paid to the respondents the said premium.

1776.

Rowland Jackson, Esq;

Plaintiff

John Hogan, lessee of Henry Wallis, Esq; John Jackson, Elinor Jackson and George Jackson,

Defendants,

In Error. Case 38.

2d December, 1776.

THE Reverend George Jackson deceased, in August 1756, was seised of the several real estates and descendible freeholds following, all situate in the county of *Waterford*; viz. the towns and lands of *Coolishall* and *Glanbegg* in fee simple; the lands of *Ballyduffultra* and *Ballygally*, for lives renewable for ever; and of three inconsiderable freehold tenements; the first held under an article for three lives *to be* named; the second under a lease for three nominated lives, then all in being; and the last under a like lease for three lives, of which he himself was then the survivor; with an agreement as to the first, and a covenant as to the two last respectively, for a reversionary term of 21 years, to commence from the death of the surviving *cestui que vie*.

The lands of *Glanbegg* and *Ballygally* were of the yearly value of 150*l.* subject to a rent of 45*l.* payable out of *Ballygally*, and the timber on these denominations was valued at 200*l.* *Coolishall* and *Ballyduff* were of the yearly value of 350*l.* subject to a rent of 50*l.* payable out of the latter. The timber on these lands was valued in the year 1769, at 4500*l.* *Glanbegg* and *Coolishall* were incumbered with debts of John Jackson, his elder brother, to the amount of 5900*l.* The three small freehold tenements produced an annual profit of 30*l.* the gross value of the whole was 240*l.* his personal fortune was 1300*l.* and his debts, with the addition of his funeral expences, amounted to 195*l.*

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He had living a mother advanced in years ; an uncle, *Edward Jackson*, his presumptive heir, an uncle, *John* ; and a cousin-german *Henry Wallis* ; two nephews and a neice, *John*, *George*, *Ellen*, natural children of his elder brother *John Jackson*, besides other collateral relations.

Thus circumstanced as to family and fortune, on the 9th of *August* 1756, *George Jackson* duly made his will in the following words: “ In the name of God *Amen* ; I the reverend “ *George Jackson*, of *Glanbegg* in the county of *Waterford*, clerk, “ being in perfect health, but mindful of mortality, thanks be “ to Almighty God, do hereby publish this my last will and tes- “ tament. First I recommend my soul to Almighty God, “ and my body I desire may be interred with my ancestors “ in *Lismore* church, in a decent manner ; and as to my worldly “ substance, I give and bequeath unto my dearly beloved mother “ *Mary Jackson*, my house and lands of *Glanbegg*, with all their “ appurtenances, for and during the term of her natural life, “ clear and free of any deduction or charge whatsoever ; and “ also the lands of *Ballygally*, subject to the rent only payable “ thereout, for the term of her natural life, *without liberty of* “ *committing waste thereon*. I also give and bequeath unto *Ellen* “ *Corkeran*, now of *Coolishall*, the sum of 30 *l.* sterling, to be “ paid her yearly during her life, for the support of her and her son “ *George Jackson*. I also give and bequeath unto her daughter “ *Ellen Jackson*, the sum of 20 *l.* sterling, to be paid her half yearly, “ till she arrives to the age of 21 years, and I then give and be- “ queath her the sum of 500 *l.* I also give and bequeath unto “ *John Jackson*, eldest son of the said *Ellen Corkeran*, the like “ sum of 20 *l.* sterling, till he arrives to the age of 21 years, “ and then I give and bequeath unto the said *John Jackson*, the “ sum of 500 *l.* sterling ; and in case the said *Ellen Corkeran* “ should die before the said *George Jackson*, then I give the “ said *George Jackson* the yearly sum of 20 *l.* sterling till he ar- “ rives to the age of 21 years ; and then I give and bequeath “ the sum of 400 *l.* to the said *George Jackson*. All which said “ bequests are to be raised and levied out of my lands of *Glanbegg*, “ *Coolishall*, *Ballygally* and *Ballyduff*, all situate in the Barony of “ *Cashmore* and *Cashbride* and county of *Waterford*. But my “ will and desire is, that if the said *Ellen Jackson*, *John Jack-* “ *son*, and *George Jackson*, or any of them should not be bred

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" up and educated in the Protestant religion, that then and in
 " such case, or in case that they or any of them should not mar-
 " ry Protestants, then and in either of the said cases, my will is,
 " that the said *Ellen Jackson*, *John Jackson* and *George Jackson*,
 " shall have and be entitled unto only 100*l.* apiece, at their re-
 " spective ages of 21 years; and in case the said *Ellen Jackson*
 " should marry without the consent of my executors herein after
 " named, that then she shall be entitled but to 100 *l.* sterling. I
 " also give and bequeath unto my cousin *Henry Wallis*, of *Curry-*
 " *glass*, the sum of 1000 *l.* sterling, to be paid to him as soon as
 " conveniently may be after my decease. I also give and bequeath
 " to my uncle, *Edward Jackson*, the yearly sum of 30 *l.* sterling,
 " during his life. I also give and bequeath unto my uncle
 " *John Wallis*, the sum of 100 *l.* sterling. I also give and be-
 " queath unto my relations *William Kenab*, and *Jane* his wife,
 " the sum of 200 *l.* sterling. I also give and bequeath unto
 " my dearly beloved mother, *Mary Jackson*, all the remainder
 " and residue of all the effects, both real and personal, which I
 " shall die possessed of. And lastly I do constitute, nominate and
 " appoint *Christopher Musgrave* of *Tourin*, and *Henry Eeles*, of
 " *Lismore*, Esq; executors of this my last will and testament, and
 " guardians over the said *Ellen Jackson*, *John Jackson*, and
 " *George Jackson*. In witness, &c."

The testator lived till the 8th of *May* 1761, and then died a bachelor, without any other alteration in circumstances, than his having discharged 500*l.* of the incumbrances affecting his fee simple estates. He left surviving him all his above-named relations, legatees in his will. And upon his death, *Mary* his mother entered into possession of his several real estates, claiming the same under his will.

In *Trinity* Term 1761, *Edward Jackson*, the uncle and heir at law, filed his bill in the Court of Chancery in *Ireland*, against the said *Mary Jackson*, alledging the want of deeds, and temporary bars, which prevented his proceeding at law; and praying an account of the rents and profits, and to be decreed to the possession of the real estate, of which the testator died seised; insisting, that the same did not pass to his mother under the residuary clause in his will.

Mary Jackson having put in her answer, the cause came on to be heard before the Lord Chancellor *Bowes*, on the 14th of *De-*
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cember 1762, when his Lordship directed, that the bill should be retained for a year, with liberty for the plaintiff, in the mean time, to try his title at law; that all deeds should be produced, and that temporary bars should be waived.

Accordingly, in *Michaelmas* Term 1762, *Edward Jackson*, in the name of *Henry Prendergraft*, his feigned lessee, brought an action of trespass and ejectment in the Court of Common Pleas, in *Ireland*, against *Mrs. Jackson*, for recovering the lands of *Coolishall* and *Ballyduffultra*; to which she pleaded, and the cause was tried at the bar of that Court, in *Easter* Term following; when the jury found a special verdict, setting out the title of *George Jackson* to the lands in question, and his will, in the words thereof.

This special verdict was several times argued in that Court, and in *Trinity* Term 1764, judgment was given for the defendant, *Mrs. Jackson*, by the unanimous opinion of the Lord Chief Justice *Aston*, and the other judges.

Edward Jackson having died intestate, on the 20th of *June* 1763, *Rowland Jackson*, his only son and heir, the now plaintiff in error, took up the cause, and in the name of *Henry Prendergraft*, the nominal plaintiff in the ejectment, brought a writ of error, in the Court of King's Bench in *Ireland*; and in *Easter* Term 1767, after many arguments, the judgment of the Court of Common Pleas was reversed, by Lord *Annaly* and Mr. Justice *Scott*, against the opinion of Mr. Justice *Robinson*.

To reverse this judgment, *Mrs. Jackson* brought a writ of error, in the Court of King's Bench in *England*; where, in *Hilary* Term 1768, the cause came on to be argued, and was ordered to stand over to the then next term. But the writ of error having abated by *Mrs. Jackson's* death, there was no further argument.

Mrs. Jackson died on the 13th of *January* 1768, having first made her will, bearing date the 31st of *October* 1764, and thereby gave and bequeathed (subject to her debts) all her real and freehold estates, of and in the towns and lands of *Glanbegg*, *Ballygally*, *Coolishall*, and *Ballyduffultra*, and also all her personal estate, of what nature or kind soever, to *John Jackson*, *George Jackson*, and *Ellen Jackson*, children of *Ellen Corkeran*, and to her nephew, *Henry Wallis*, to be equally divided between them, share and share alike, with clauses of survivorship; and appointed
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Christopher Musgrave, and *Henry Eeles*, Esqrs; and the said *Henry Wallis*, her executors.

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Immediately after the death of *Mrs. Jackson*, the now plaintiff in error, *Rowland Jackson*, contrived to get into the possession of the estates in question, and received the rents and profits thereof to his own use.

In *Hilary* Term 1769, the devisees of *Mary Jackson*, in the name of their feigned lessee *John Hogan*, the now defendant in error, brought an ejectment in the Court of King's Bench in *Ireland*, against *Rowland Jackson*, for recovery of the several lands of *Glanbegg*, *Coolishall*, *Ballyduffultra*, and *Ballygally*, of which he had so possessed himself; and issue being joined, the cause came on to be tried at bar, in *Easter* Term 1771, when the jury brought in a special verdict, in substance as follows :

They found, that *George Jackson*, father of the testator, purchased the towns and lands of *Glanbegg*, and *Coolishall*, and died seised thereof in fee, leaving two sons, *John* his eldest, and the testator, and no other issue; and that on his decease, *John Jackson*, as his heir, entered and became seised in fee of the said towns and lands, and died so seised without issue; and that on his death the same descended to the testator, as his brother and heir, and he entered and became seised in fee. That *Sir William Abdy*, Bart. and *Jonathan Burward*, being seised in fee of the town and lands of *Ballyduffultra*, and of the lands of *Ballygally*, by two several indentures of lease, dated respectively the 9th of *June* 1739, and by livery and seisin, demised the same respectively to the said *George Jackson* the elder, and his heirs, for three lives in being, renewable for ever, with full liberty to commit waste. That the estate of freehold in these lands vested in the testator, who became seised thereof, to him and his heirs, by virtue of the said several leases as special occupant, he being heir of *George Jackson* the elder. That the testator, being so seised, on the 9th of *August* 1756, duly made his will, in the words before stated. That the testator, on the 8th of *May* 1761, died seised of the said several lands, unmarried, and without issue, and without revoking or altering his said will. That *Edward Jackson* was, at the time of the testator's making his will, his uncle and presumptive heir, and at the time of his death his heir at law; and that he died on the 20th of *June* 1763, intestate, leaving

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leaving *Rowland Jackson*, the plaintiff in error, his only son and heir. That the testator, at the time of making his will and at his death, was entitled to the tenements, viz. the Old House at the ferry in *Lismore*, called the *Old Mill*, by virtue of an agreement, executed by the agents of the Earl of *Cork* and *Burlington*, by which it was agreed, that *George Jackson*, the testator's father, his heirs, executors, &c. should hold the said Old House for three lives, to be named, and after the death of the survivor, for 21 years, at the yearly rent of 5s. A tenement in *Lismore*, called *Mulcabys* and *Dart's* holding, by virtue of an indenture of demise, dated the 9th of *June* 1727, made by *Charles Baggs*, to *George Jackson* the father, his heirs and assigns, for the lives of *Charles Baggs*, *Henry Fervois* and *David Crotty* (all living) and the life of the survivor, at the yearly rent of 40s; in which lease was an agreement, that the lessee should hold the premises for 21 years, from the death of the survivor. And a tenement called *Geobagans*, containing 86 acres, in the county of *Waterford*, by virtue of a lease dated 26th *March* 1723, made by the Earl of *Cork* and *Burlington* to *George Jackson* the father, his heirs and assigns, for the lives of *John Jackson*, *Henry Jackson* and the devisor, and of the survivor, at the yearly rent of 25 *l.* sterling, &c. with a covenant on the part of the Earl, that the lessee, his heirs, &c. should hold the premises for 21 years, from the death of the survivor of the said three lives. That the testator was the survivor of the said three *cestuique vies*; and the said three leasehold interests duly came to him before the making his will. That *Mary Jackson*, the mother of the devisor, on his death entered into and became seised of *Glanbegg*, *Coolishall*, *Ballyduffultra*, and *Ballygally*, for such estates therein, as passed to her by the said will; and that on the 31st of *October* 1761, she made her will as the law requires, to the effect before stated. That *Mary Jackson* died on the 31st of *January* 1768, so seised of *Glanbegg*, *Coolishall*, *Ballyduffultra* and *Ballygally*. That the lands of *Glanbegg* and *Ballygally* were, at the time of making the will of *George Jackson*, of the yearly value of 150 *l.* subject to the payment of 45 *l.* yearly, out of the rents of *Ballygally*; and that the woods and timber trees upon the said lands, were of the value of 200 *l.* That the lands of *Coolishall* and *Ballyduffultra* were of the yearly value of 350 *l.* deducting 60 *l.* a year rent and quit rent, and that the woods on these lands were, in the year 1769, of the value of 4500 *l.* That at the time of making the

the said will, the lands of *Glanbegg* and *Coolishall* were subject to debts and incumbrances, amounting to 5900 *l.* and that at the testator's death, there were incumbrances to the amount of 5400 *l.* affecting *Glanbegg* and *Coolishall*; all which were created by *John Jackson*. That all the pecuniary legatees named in the will of *George Jackson*, were living at his death, and that *Mary Jackson* was 60 years of age and upwards at the time of making his said will. That the testator paid off 500 *l.* of the incumbrances, soon after the making his will. That the value of the personal assets of *George Jackson*, exclusive of his said chattels real, at the time of making his will, and at his death, did not exceed 1300 *l.* That the amount of his debts, payable out of his personal assets, added to his funeral expences, was 195 *l.* That the yearly value of his said chattels real, was 30 *l.* and that the gross value thereof, at the time of making his will, and at his death, was 240 *l.* But what estate in the said several lands and premises, or any of them, *Mary Jackson* became entitled to under the testator's will, the jurors were ignorant; and therefore found for the plaintiff or defendant, as the Court should determine the question of law.

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This special verdict was several times argued in the Court of King's Bench in *Ireland*; and in *Easter Term* 1774, the Court gave judgment in favour of the defendant *Rowland Jackson* (now plaintiff in error); against the opinion of Mr. Justice *Robinson*, that judgment should be given for the plaintiff in ejectment.

Whereupon, in *Michaelmas Term* following, the plaintiff (now defendant in error) brought his writ of error in the Court of King's Bench in *England*, to reverse that judgment; and in *Trinity Term* 1775, that Court reversed the judgment of the Court of King's Bench in *Ireland*, and unanimously decided in favour of the plaintiff in ejectment.

To reverse this latter judgment, a writ of error was brought in Parliament; and on behalf of the plaintiff in error, it was said, the subject of it was really of the most interesting and momentous concern to him. The whole of a considerable patrimonial estate which he had enjoyed for several years, under that state of security and confidence in his title, which the concurrent opinions of the most eminent counsel in the two kingdoms in favour

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of it, coinciding with the opinion of the Court of Chancery in *Ireland*, and confirmed by two successive solemn adjudications of the Court of King's Bench there, necessarily induced, was now at stake, upon a question well worthy the attention, as well of every testator, as of every heir at law in this kingdom; a question, whether certain general *indeterminate* words, *irregularly* used in a *vague* residuary clause, should *strip* the heir at law of that inheritance which the law gives him, and *force* it upon a devisee, from whom the testator, in all the preceding parts of his will, had, by the most cautious limitations and restrictions, and in the most guarded and proper terms, expressly withholden it.

This question arose upon the residuary clause in the testator *George Jackson's* will; which clause, the defendant contended, disinherited the testator's heir at law, whilst the plaintiff insisted, that every word in the clause was sufficiently satisfied without so violent a construction; which he submitted, was incompatible with the express tenor of the will itself, and contradictory to all the rules of law which govern the construction of wills.

I. It is an established rule of law, upon the strength of which the security of many adjudged titles at this day depends, that an heir at law shall not be disinherited, but by *express words*, or *necessary implication*. The residuary clause in this case, contained no express devise of the *real* estates; the word *effects* being properly applicable only to *personal* estate. All the dictionaries of the *English* language uniformly concur in explaining it, by the words *goods* and *moveables*; the same meaning is constantly annexed to it by our *English* writers; this is the acceptation it bears in common speech, and we find it used in the same sense in our acts of Parliament, and public instruments, and treaties of peace and commerce. The subsequent words, "which I shall die *possessed* of," supported and fortified this construction, because the express allusion of those words to a future acquisition, was inapplicable to real estates, as none acquired after the publication of the will could pass by it, and the word *possessed*, properly relates only to personal estate. And as to the word *real* annexed to the word *effects*, it applied expressly to the chattels real, found by the verdict to have been left by the testator. Nor was there any necessary implication, that any greater interest in the real estates was intended for the mother, than the estate for life,

life, *without power of waste*, expressly devised to her in two of the denominations. Such an implication, so far from being necessary, was incompatible with, and would merge and destroy, and in fact revoke the mother's express estate for life, and restriction from waste; and would break through another rule as well of law as of common sense, which says, what is *expressed*, shall not be destroyed by *implication*. To say, that in order to give effect to the intention of a will, we are under the necessity of implying a revocation of it, carries the air at least of a paradox.

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But it is said, that we are to presume the testator was *inops concilii*, and therefore not tied down to use words in their proper sense; and that in some of the *Irish* bankrupt and insolvent acts, the word *effects* is applied to real estates.

To this it may be answered, that the testator was a clergyman and a man of letters, which entitles him to credit for a knowledge of the proper sense of words; and indeed the skill he had shewn in the express provisions for his mother, and for his brother's natural children, his conduct in distinguishing the several funds out of which the legacies should arise, and in restraining his mother from waste in the lands devised to her for life, because in part of those lands, *viz. Ballygally*, the power of committing waste contained in the original lease for lives, might be supposed to pass to her by a devise for life, if not expressly restrained; were strong proofs, that he very well understood what he was about. Besides, there was some difficulty in reconciling the presumption of the testator's being *inops concilii*, and a stranger to the meaning of the words he used, with a supposition of his having searched the *Irish* bankrupt and insolvent acts for the meaning of the word *effects*; which we must presume he did, when we appeal to those acts for the sense in which the testator used that word. But this appeal to the *Irish* statutes, forced, extraordinary, and inconsistent as it appeared, was founded on a mistake; for in all those acts, the word *effects* particularly relates to *chattels*. In the insolvent act, 23 Geo. II. c. 17. the word *effects*, is always preceded by the word *estate*, except in one instance only, where the prisoner, whose effects are assigned, is sufficiently described by the assignment of his goods or personal estate. And 1 Geo. III. c. 16. proves clearly, that the words

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real effects, in the language of the *Irish* statutes, mean leases for years, *i. e.* *chattels real*; where it says, that nothing therein shall prevent mortgages, judgments, &c. to take place upon the *lands, tenements, or real effects* of the prisoner; for the preceding words *lands and tenements*, fully comprise all the *real* estate, and that only, and leave nothing but interests for years in lands, *i. e.* *chattels real*, for the words *real effects* to apply to. And in the same statute, the words *estate* and *effects* are together occasionally substituted for the words *real and personal estate* used immediately before, which preserves their distinction, by referring *estate* to *real*, and *effects* to *personal* property; and wherever the latter word occurs alone, it has an obvious relation to bank or copartnership stock, or to cash or monies deposited or concealed in the hands of other people. But above all, the form of the oath required by these statutes to be taken by the debtor, marks the distinction by the most manifest application of the word *effects*, to personal estate only; for the words of that oath in all the *Irish* insolvent acts are, *estate, goods and effects*. So that if the *Irish* statute book was to be considered as the testator's glossary, there would be an end to the present question; and no doubt would remain, that the words *effects real*, were used as synonymous with *chattels real*.

But it had been alledged, that the testator's future interests for 20. 20. and 21 years respectively, in the lands called the *Old Mill, Mulcabys, and Darts, and Geobagan, and Burgefs land*, one of which terms was to commence in possession upon his death, did not fall under the description of *chattels real*.

To this it was answered, that these interests were created by the covenant and agreement of the lessor with the lessee, found by the verdict, that the lessee and his representatives should enjoy the lands for such terms of years respectively, paying such rents; that such agreements are actual leases, and pleadable as such, and so it has been decided in a great variety of cases*. These leasehold interests were clearly no part of the testator's estate of freehold or inheritance, nor yet were they *chattels personal*. What were they then, if they were not *chattels real*? Lord Coke says, 1. *Inst.* 345. b. "*interesse* is vulgarly taken for a term, or chattel real, and more particularly for a future term;" so that in his days, at least, future terms were *chattels real*.

**Vide* Bacon's
Ab. vol. III.
p. 419, 420.

Still it was urged, that though these leasehold interests were chattels real, the testator could not properly be said to have died *possessed* of them, as they were *future* terms, which did not commence in possession during his life.

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But this objection came with very little propriety, from those who contended for straining the word *effects* to include *real* estate, under a presumption that the testator was *inops concilii*, and therefore not tied down to propriety of expression. The title of the plaintiff in error needed no such latitude of construction, as this objection surmised; indeed it might have been imagined, that the second special verdict found in this cause, would have precluded this, as well as the last objection, when it expressly stated, that the yearly value of the *chattels real*, of which the testator *was possessed* at the time of making his will, and at his death, was 30 *l.* &c. The land itself is not a chattel, it is an hereditament; it is the interest or term of years in the land, which constitutes the chattel real. A man may be properly said to be in possession of this interest, though the actual possession of the land by virtue thereof, is not to take place for a thousand years to come; he is said to be in possession of this interest because it is vested in him, so that he may exercise every act of ownership over it; he may give it, sell it, assign it, settle, bequeath, or dispose of it as he thinks proper; he possesses and disposes of it as a *present* subsisting *right* to a *future* actual *occupation* of the land. Lord Coke in the place before cited, after saying, "*interesse* is vulgarly taken for a term or chattel real, "and more particularly for a future term," adds, "the party "entitled hereto is said, *in pleading*, to be possessed *de interesse* "*termini*." So that in fact, the word *possessed* was so far from not being properly applicable to the testator's future leasehold interests in this case, that the ablest Special Pleader could not have described them, or expressed the testator's ownership therein, at the time of his decease, with more strict legal propriety, than by the word *possessed*.

But it was contended, that the introductory words, *as to my worldly substance*, indicated the testator's intention to dispose of every thing he had; and the case of *Ibbetson v. Beckwith**, was insisted upon as in point. In that case, the testator, after saying, "as touching my worldly estate, wherewith it has pleased God

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“ to bless me, I give, devise, and dispose of the same in manner following,” makes the following devise; viz. “ I give unto my loving mother all my *estate* at *Northwith*, &c. for her natural life, and to my nephew *Thomas Dodson*, after her decease.” The question was, whether *Thomas Dodson* took an estate in fee, or for life? And Lord *Talbot* decreed, that he took in fee.

The word *estate*, used in the case of *Ibbetson v. Beckwith*, is properly applicable to *real* estates, and of this no doubt existed; but the omission of the word *heirs*, left it a question, whether it passed more than an estate for life to *Thomas Dodson*; for the devise to him was not confined by an express limitation for life. It has often been held, that the words *all my estate*, will carry the fee without the word *heirs*. The word *effects*, used in the present case, is properly applicable to *personal* estates only; and *effects real* are synonymous to *chattels real*; could they even signify lands, they could give no greater estate than the word *lands* would have done, *i. e.* an estate for life only, for want of the word *heirs*; for it is an indisputable rule of law, that a devise of lands to a man indefinitely, without the word *heirs*, or other words tantamount, gives only an estate for life. The force of the introductory clause, in the case of *Ibbetson v. Beckwith*, did not rest on the words *as touching my worldly estate*, but on the subsequent words, *I give, devise, and dispose of the same in manner following*. These words expressed a *total disposition* in general terms, referring to what followed for the particulars. In the present case, the words *as to my worldly substance*, imported no devise, bequest, or disposition at all; they only expressed a transition of the testator's contemplation from his spiritual to his temporal affairs, and that the subsequent dispositions related to his worldly substance; but in no sort expressed or implied the measure, extent, or *quantum* of such dispositions. Besides, introductory words, even where they express a disposition, are frequently considered rather as the *formal* words of the scrivener, than as any expression of the testator's intent. As to this point, the case of *Timewell v. Perkins* * is a direct authority; where the testator, after saying, *as touching the temporal estate with which it hath pleased God to bless me, I give, bequeath, and dispose of as follows*, devised in the words following: “ Item, all those my freehold lands and hop grounds, with the messuages, tenements

* 2 Atk. 102.

"ments, barns, &c. now in the tenure of, &c. and all other
"the rest, residue and remainder of my estate, consisting in ready
"money, plate, jewels, leases, judgments, mortgages, &c.
"or in any other thing whatsoever and wheresoever, I give unto
"my dearly beloved *Arabella Hitchins* and her assigns for ever."

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Here, though the strength of the introductory clause was insisted upon, and it was urged that the word *estate* would include lands as well as personal estate; yet as the word *estate* in the residuary clause, was coupled with personals, it was held, that the residue of the real estate did not pass; and *that whilst it admitted of a doubt, certainly the heir at law ought to be preferred.*

But it was further insisted, that if neither the residuary or the introductory clause separately contained words sufficient to pass the real estate, yet that defect might be supplied by blending them together, and bringing down the words *worldly substance* from the introductory clause, where the testator himself had thought proper to leave it, into the residuary clause, where the defendants claim could not well do without it, and that this would remove all difficulties at once; for the word *substance* is used in a general sense, and applied to *real estates* in the statute 4 & 5 Phil. & Mary, c. 8.

This, however, would be only substituting one difficulty in the room of another; for upon looking into the statute, it appears that the words of the preamble, the only place in which the word *substance* occurs, are "lands, tenements and hereditaments, and other great *substance* in goods and chattels moveable;" which words, so far from extending the word *substance* to real estates, expressly confine it to one single species of personal estate, *viz. goods, or chattels moveable.* But without entering into a discussion of the meaning of the word *substance*, it might be sufficient to observe, that the testator had not thought proper to use that word in the residuary clause; and it was conceived, that the parties were to content themselves with the will as he left it, and were not at liberty to exchange the words actually used by him, for others better adapted to their own purposes. Should it even be allowed that they might combine these two clauses together, in support of an intent implied in either, not incompatible with the rest of the will; yet no rule of construction

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struction could authorize the tacking together the first and last lines of a will, in order to annihilate all that intervenes; nor indeed was it easy to conceive, how a residuary clause, wanting the force to pass real estates, could possibly derive that force from an introductory clause, which contained no disposing force at all.

* Lev. 130.

† 12 Mod.

592.

‡ 1 Eq. ab.

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II. Another rule of construction is, that where words used by a testator are indifferently applicable to real and to personal estates, they shall not, if there be any thing to satisfy them, receive a construction prejudicial to the heir; and this was determined in the three leading cases of *Bowman v. Milbank**, *Shaw v. Bull*†, and *Merchant v. Twisden*‡. In the first, the testator devised in these words, "I give *all* to my mother, *all* to my mother;" and it was held that no lands passed, as the word *all* might relate either to real or to personal estate. In the second, a testator seised of five messuages, after making a complete devise of four of them, says, "and *all* the *overplus* of my *estate* to be at my wife's *disposal*;" and it was held, that the fifth house did not pass, even by this strong residuary clause. In the third case, a testator, after giving certain legacies, says, "*all* the rest and residue of my *estate*, chattels real and personal, I give and devise to my wife;" and it was held, that the reversion of lands settled in jointure on the wife for life, did not pass to her by this residuary clause. The opinion of the Court in the case of *Shaw v. Bull*, as delivered by the Lord Chief Justice Trevor, applied directly to the present case. His words were, "That in the construction of wills, generally the words *my estate, the residue of my estate, or the overplus of my estate*, may well pass an inheritance, where the *intent is apparent* to pass it; but such intent to carry an inheritance by such words, must be very *apparent* and *necessary*, to be drawn from the words of the will, and circumstances of the case; for if the words be indifferent to real and personal estates, or may be applied to personal alone, there the heir at law is not to be disinherited by the implication of such words, or by any implication at all, but what is a necessary one." Now in the present case, the words *bequeath, effects, and possessed of*, were indisputably much less applicable to real than to personal estate. They have never been admitted to apply to the former, but where insurmountable arguments of such an intent, afforded by other

other parts of the will, rendered that construction necessary. But here, the other parts of the bill were so far from requiring such a construction, that they were destroyed if it was admitted. The words, in their most proper sense, apply to personal estate, and the chattels real which the testator left, shewed the reason for his annexing the word *real* to *effects*, which otherwise properly means *moveables* only, and fully satisfied those words; they could not therefore be extended to real estates.

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III. It is also an established rule, that *general* words in one part of a will shall be so construed, as not to defeat the *plain intention* of the testator, to be collected from any other part of his will. The force of this rule is sufficiently verified in the case of *Mervin v. Strong**, where the testator made a residuary devise of "all other the lands, tenements and *hereditaments*, in the counties of *Tyrone* and *Meath*, or either of them, whereof he was seised in fee simple, or of which any other person was seised in trust for him;" a question arose, whether the reversion in fee of certain settled lands in the county of *Tyrone*, passed by that residuary clause? Lord *Mansfield*, in delivering the opinion of the Court, observed, that the generality of the expression, if unrestrained and unqualified by other words, would carry *all* the testator's estate in possession, reversion, or remainder; but that it might be restrained by other words and expressions in the will; and that it was the same thing, whether such restriction be directly expressed, or plainly to be collected from the will; and accordingly, upon the strength of some preceding expressions in the will, which appeared not to be consistent with an intention to devise the reversion of the settled estates, the Court of King's Bench in *England* held that the reversion did not pass, and thereupon reversed the judgment of the Court of King's Bench in *Ireland*. Now in the present case, the devise to the mother for life, *without power of waste*, was incompatible with an intention to give her the same lands in fee; and therefore the residuary clause must be so construed, as to avoid this inconsistency. In the case of *Mervin v. Strong*, the general words were sufficiently correct, comprehensive and express, to pass any real estate whatsoever, and the restriction was indirect and implied; but in the present case, the general words were defective, irregular and improper, if applied to real estates, and

* 2 Burr. 912.
Ante Vol. V.
496. by the
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the restriction was direct and express. Surely a rule, which can, upon the score of an *implied* restriction, deprive correct words of a force they regularly possess, is sufficiently cogent to restrain upon the ground of an *express* restriction, incorrect words of a force which regularly is foreign to them; nor ought the ambiguous relation of the word *effects*, in this case, be deemed more potent, than the clear, established, technical force of the word *hereditaments*, in the case of *Mervin v. Strong*.

But the annuity of 30 *l.* given to the heir, was urged as an argument that the testator intended to disinherit him; as it would be absurd to give *all* and a *part* to the same person.

This annuity was not charged upon the *real* estate, it was to arise out of the *personal*; where the testator intended to charge the real estate, he had done it particularly and expressly; where he had not expressed it, it was evident he had no such intention; and therefore this bequest could imply no exclusion of the real estate of which it was no part. If a devise of real estate to an executor, is no implication against his beneficial interest in the personal estate, much less can the disinheritance of an heir at law, whose interest is not founded on the will, and is much more favoured, be implied from a bequest out of the personal estate. This annuity was a provision for the heir, evidently proceeding from the testator's regard to him, and a desire of securing to him some kind of income at all events. The real estate was so exhausted by the devise to his mother for her life, the provision for his brother's natural children, and prior subsisting incumbrances, as to afford no income at all to the heir, during the continuance of those charges; and considering his advanced age, it was probable those charges would not determine in his lifetime. The testator therefore gave him an annuity for life out of the personal estate, as some provision during the immediate deficiency of the real estate. This act of regard and attention to the immediate interest and security of the heir, was endeavoured to be wrested into an indication of the testator's intent to disinherit him; but surely it was a very strong proof of the contrary: And the objected inconsistency of giving *all* and a *part* to the same person, applied directly to the mother's claim; which grasped at the *whole fee* of those *very estates*, which were expressly given to her for *life*, *without power of waste*. If indeed the title of the heir at law
needed

needed the aid of conjecture, the express provisions made by the testator for his brother's natural children, out of his real estates, shewed the improbability of his intending to give the inheritance of those estates to his mother. She was old, she was fond of those children, and he well knew her affection for them was such, that the leaving her the estate would, as the event had verified, be leaving it, through her, to those very children. Such a step was inconsistent with the care and pains he had taken in limiting and ascertaining the provisions he intended for them; because it would of course supersede and render those provisions nugatory; nay, the testator had expressly declared, that these children should have only 100*l.* apiece upon their coming of age, if they were not educated in the Protestant religion, or should not marry Protestants. Could any thing be more idle or fruitless than this restriction, if he intended to leave his estates in a channel, through which he could not but foresee, it would come to those children in all events? Besides, the express restriction from waste, with which the testator had circumscribed the estate for life given to his mother, marked his solicitude to prevent her from prejudicing, in favour of his brother's natural children, the objects of her fondness, that inheritance, which, as a conscientious and well intentioned man, he designed should come to his heir at law, by that same channel of legal descent, through which he himself became entitled to it.

But it was said, that the testator's mother was the first object of his bounty, as appeared by the affectionate terms in which he spoke of her; that a testator is presumed not to die intestate as to any part of his estate; and that if the residuary clause was inconsistent with the preceding parts of his will, it must controul those preceding parts, for *cum duo inter sepugnantia reperiuntur in testamento ultimum ratum est.*

The testator's mother was certainly so far the first object of his bounty, as the securing to her a competent income during her life; but he expressly denied her more in his freehold estates, when he restrained her from the power of committing waste; nor was it probable that he thought her an object of any farther bounty out of those estates, for she was an old woman, and incapable of having children to call for the inheritance; a gift of the inheritance to her, would have been bounty not so much to her,

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her, as to those whom she might think proper to bestow it upon. Where there is a doubt, the general feelings of mankind must turn the scale; and surely those general feelings would never say, that the testator intended to give his estate from the heir, who was a near relation, to any stranger whom his mother, an old woman, should be pleased to name. As to the position, that a testator is presumed not to die intestate as to any part of his estate, it amounts to this, that a man cannot make a will without resolving to disinherit his heir at law of every foot of land; for so far as he does not disinherit him, he really dies intestate; because every devise to an heir at law, in *fee*, either immediate, or in reversion, is void, and the heir takes by *descent*, and not by the *will*. The technical skill which the testator had shewn in other parts of his will, afforded ground to presume, that he was not ignorant of this point of law; and this skill might lead him to be silent, where he knew the estate would equally descend to his heir, whether he inserted or omitted a devise to him. And as to the maxim respecting the repugnancy in a will, it was inapplicable in this case, because the residuary clause was not repugnant to the preceding parts of the will; if the words of that clause were understood in their usual and proper signification, by considering the words *effects real*, as synonymous to *chattels real*. But the real force of this objection became most conspicuous, by stating the objection itself in its true light, thus: The testator had spoken so affectionately of his mother, that it was impossible he could intend to leave a foot of land to his heir at law; and therefore, notwithstanding he had in the most express words confined her to an estate for life, *without power of waste*, in two denominations, yet it must be concluded, that he intended her the whole fee in all his lands. And to support this conclusion, we are to persuade ourselves that a testator can never devise part only of his real estate, without intending at the same time to dispose of the whole, although his express words import the contrary; and upon that ground we are to introduce a presumed repugnancy between the express tenor of the preceding parts of the will, and the ambiguous meaning of some irregular words in the residuary clause, to warrant the application of a rule, by which the latter may be allowed to extirpate the former; and the result of this reasoning we are to call the testator's intent. It is extraordinary indeed, when a testator expressly says, that his mother *shall* be tenant for life, and *shall not* have power of committing waste, to find,

find it seriously insisted upon, that the testator intended she should *not* be tenant for life, and that she *should* have power of committing waste; and this because he has used certain words in a residuary clause, which in their *proper* sense have no relation to the matter.

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It was however contended, that the words *all the remainder and residue*, in the residuary clause, were words of relation to the antecedent dispositions, some of which being out of the real estate, that relation extended to the real estate.

But the relation of these words was satisfied by a retrospect to the personal estate, out of which the last preceding dispositions had been made, and this relation was the most grammatical, direct and natural; because the words *remainder and residue* immediately followed, and were coupled with the dispositions which affected only the personal estate, and which had been taken up by the testator, after he manifestly appeared to have dropped all contemplation of his real estate. Besides, could it be consistent with the testator's intent, that the residuary words should be referred to the dispositions made out of the real estate, in order to merge, frustrate, and destroy those very dispositions? Did he take the pains to limit his mother an express estate for life, and restrain her from waste, only to justify the establishing such relation in the residuary words, as should destroy that limitation and restriction, and give her that fee which he expressly denied her the power over? Are words to be forced upon a relation, which the instant it is admitted, inevitably destroys the very object to which it refers, and removes the very ground upon which we would establish such relation? Not so says the maxim, *talis interpretatio semper fienda est ut evitetur absurdum*.

But it was said, that the intent of the testator is to be collected from the whole will taken together, and not from any particular part only; and that construction is to be preferred, which gives effect to every part of the will.

The rule is admitted in its full extent; and the plaintiff wished to rest his title on the literal and obvious application of it to this case. The intent of five parts out of six of the whole will was

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clear and express, even accurately and skilfully so, to give the mother only an estate for *life, without power of waste*; the residuary clause was consistent with the rest of the will; and every disposition therein would have its proper effect and operation, if the words of that clause were understood in their usual and proper sense, in which they signified the chattels *real* and *personal*, which the testator died *possessed* of. But if that sense was broken through, and the words strained to comprehend *real* estates, an intent would be extorted from one part of the will, which was subversive of almost every other part; we at that instant merge and extinguish the estate for life, expressly given to the mother; discharge and render nugatory the express restraint from waste; frustrate and destroy the exoneration of her estate for life; confound and abolish the distinction observed by the testator, between the legacies charged on the *real*, and those affecting only the *personal* estate; and in a word, expunge and annihilate the greatest part of the will, by reducing the whole to a devise of the real and personal estates to his mother, subject to certain legacies; and all this by a forced construction to disinherit the heir at law. And it must be allowed, that there was something new in the idea of collecting from the *whole* will, an intent which overturned *five sixths* of it.

* 1 Atk. 186.

But it was still further urged, that the law presumes a testator may, during the time of making his will, alter his intention; and for this point, the case of *Pain v. Ridout* *, was cited as an authority. In that case, the testator, after giving certain lands to his wife for life, and making several dispositions of other lands, some to his brother and heir at law in tail, and some to him in fee, and also limiting to him and his issue, the inheritance in remainder of *part of the lands* given to the testator's wife for life, gave all the rest, residue, and remainder of his goods, chattels, and personal estate, *together with his real estate*, not therein before devised. The question was, whether the reversion in fee of that part of the lands devised to the wife for life, which was not otherwise disposed of, passed to her by the residuary clause? And Lord Hardwicke held, that it did.

It was not denied, that a testator may change his mind in the course of making his will; but it was denied that such a change may be presumed, without certain and indubitable evidence of it.

It must be submitted, that clear, express and prudent dispositions, accurately and skilfully made, and constituting the very body and substance of a will, require something more operative and cogent than ambiguous, imperfect, and defective words in a residuary clause, to expunge and reduce them to a nullity. Surely the ambiguity of the residuary words, was a strange ground for presuming, that the testator, at the close of his will, suddenly changed his mind, and intended the last line as a revocation of the preceding dispositions; and yet, after having discovered so much skill and accuracy in the preceding parts of his will, was at a loss how to express his intention clearly in this *critical* line. Nor could it be supposed, that he went through the solemnity of executing, and afterwards kept by him for five years and upwards an instrument as his will, five sixths whereof were not his will? In the case of *Pain v. Ridout*, the words of the residuary clause were express, comprehensive, and proper; and the real estate being added to the chattels and personal estate, by means of the words *together with*, left no doubt upon the matter. Besides, there was no express restriction from waste annexed to the estate for life; and the testator, in that case, gave to his heir at law and his issue, the inheritance of part of the lands devised to the wife for life; thereby ascertaining expressly, how much of those lands should go to his heir. It was also observable, that in that case, the heir at law was expressly and amply provided for out of the real estate. But all these circumstances were diametrically the reverse of what the present case afforded, therefore the authority of that case was not presumed to be applicable here; and though a subsequent express devise may destroy a preceding one, it was submitted, that a preceding express devise, could not be destroyed by an unnecessarily implied one.

IV. The inconsistency of the testator's giving his mother an express estate for life, without liberty of committing waste, if his intention was that she should take the same lands in fee, was insuperable. Could it be supposed, that he confined her to an estate for life in one line, for no other use than to destroy it by giving her the fee in the next? Could any thing be more absurd than to restrain her from waste, and then immediately to undo that restriction by giving her the inheritance? His expressly denying her the powers incident and belonging to the inheritance, amounted to an express denial of that inheritance.

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The testator had been extremely particular, express and guarded in the devise of the two denominations to his mother, for her life, without power of waste; if he had intended her any thing in the other two denominations, he certainly would have been no less explicit as to them; they were of much greater value, and were equally under his contemplation, for he expressly charged them with the legacies to his brother's natural children. It was inconceivable therefore, that he should be so minute and particular in ascertaining *which* of the denominations his mother should have, and limiting and circumscribing her interest therein, if he intended she should take *all* the denominations, and the whole unlimited estate in them.

But it is said, that the restriction from waste was intended only as an admonition to the mother, and to prevent her from prejudicing the fund out of which the legacies were to be paid; and that the express estate for life was by way of giving her a preference, and a clear income during the subsisting charges.

To give the fee to his mother would *destroy* the preference so said to be intended for her, by letting in the legacies immediately on her estate for life; and by removing [the restriction of waste, the whole fund would be put into her power, contrary to his intention, and she might prejudice it as she thought proper. Besides, it would be a singular expedient for securing the lands from prejudice, to restrain waste to the amount of 200 *l.* in part of the lands, that being the value of the timber on the lands devised to the mother for life, and at the same time to leave full power of waste, to the amount of 4500 *l.* and upwards, on other part of the lands, that being the value of the timber on the lands not devised to her.

Cowp. 355.

Upon the whole it was submitted, that if there was a doubt, the title of the heir at law must preponderate. This is a rule of law established beyond dispute, a rule which is universally admitted, and was recognized and affirmed by the express opinion of the Court of King's Bench, as delivered by Lord Mansfield, in a late case of *Loveacre v. Blyth*, heard in *Hilary Term* 1775; when his Lordship declared, that where the Court cannot find words in a will expressive of the testator's intention, *beyond the possibility of a doubt*, the rules of law must take place.

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Now it was impossible to deny, that the different opinions delivered by the several Courts before which this cause had been heard, proved at least, that those Courts were so far from finding in the residuary clause of *George Jackson's* will, words expressive of the testator's intention, *beyond the possibility of a doubt*, that they had not only *doubted*, but actually *disputed* about his intention; for as all agreed, that certainty of intention would disinherit an heir at law, those judgments, which in this case denied the heir at law to be disinherited, of consequence, denied the certainty of the testator's intention to disinherit him. It therefore follows, that the rules of law must here take place; and as it could not be contended, that, after such a contrariety of judgments, the residuary clause did either expressly, or by necessary implication, extend to the testator's estates of freehold or inheritance; it was submitted, that the hereditary title of the heir at law must prevail, while there is a rule of law, which says, he is not to be disinherited otherwise than by express words, or necessary implication. The title of an heir at law is founded on the laws of descent, which are *certain*, and is not therefore to be superseded by an *uncertain* devise.

On the part of the defendant it was said, that the general question on which the merits of this case turned, was, whether under the residuary clause in the will of *George Jackson*, his real estates passed to his mother *Mary Jackson*, in so full and ample a manner, as to enable her to devise the same to the lessors of the defendant? And this question would be determined by the intention of the testator, which always governs, unless it be repugnant to, or inconsistent with the rules of law. The first object of the testator's bounty, and the greatest of his affection, was his mother; for her he determined to secure a certain provision in all events, and therefore gave her a life estate in two denominations of his real property; *viz.* in *Glanberg* and *Ballygally*, which he would have her enjoy free from any incumbrance. He then proceeded to dispense his bounty amongst his other relations, whom he set down in his will in the same order as they were ranked in nature and his affection. For his brother's children he made provisions, suited to their ages, and the circumstances of their birth; and these he charged on all the real estates in question. The two next objects of his bounty, were his cousin *Henry Wallis*, and his uncle *Edward Jackson*, his presump-

J. Wallace.
J. Mansfield.
J. Alleyne.

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tive heir; his regard for whom was marked by the legacies he left them. To the former he gave 1000 *l.* to the latter, advanced in years, only an annuity of 30 *l.* for his life; and these, with the subsequent legacies to three other relations, were to come out of his personal estate. Here he paused, and taking a review of the state of his fortune, and the disposition which he had made of it, he perceived that his real estates were more than sufficient to discharge the incumbrances created by his brother, with the additional charges imposed by his own will; and that by deaths, or other events, there might happen to be a residue of his estate; he therefore recurred back to the first great object of his bounty and affection, and, in words the most comprehensive that common sense could dictate, he devised to his mother, by one general sweeping clause, every species of property which he should die possessed of; giving her the enjoyment of, and absolute dominion over it, and confiding in her disposal of it amongst those, who she knew held the first places in his heart.—A trust which she religiously performed. This appeared to be the intention of the testator, and the words which he had used sufficiently effectuated that intention. That he did not mean to die intestate as to any part of his real property, was manifest, not only from the expressive words in the residuary clause, *viz.* “all the remainder and residue of *all* my effects real and personal;” but also from the introductory words of the will, “as to my worldly substance;” which have always been understood to consist of real and personal estate, and to indicate an intent in the testator who uses them, to dispose of all his property.

But to this reasoning it was objected, I. That the residuary clause could be construed to extend no farther than to the personal estate; because the terms in which that clause was conceived, carried with them an obvious relation to personalty; and because the extending them farther would create an inconsistency between the testator’s first devise to his mother for life, and the ultimate disposal of the whole of his real property to her for ever. II. That every degree of favour is to be shewn to an heir at law; and he is not to be disinherited, but by express words, or necessary implication.

To the first objection it was answered, that to support the first part of it, the plaintiff assumed three propositions; 1st, That the

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the term *effects*, means personal goods or substance only. 2dly, That the words *effects real*, are confined to that particular species of property called *chattels real*. 3dly, That by the devise of *effects real*, the testator intended to devise to his mother nothing more than the reversionary terms for years, which were to take place in the three descendible freeholds, after the deaths of the several *cestui qui vies*. But the defendant contended, 1st, That had the testator made use of no other words than *all the remainder and residue of all my effects*, without annexing the epithets *real and personal*, these alone, upon the true construction of the will, would have been sufficient to have passed the remainder of his real estate; the term *effects*, in the common understanding of mankind, signifying property or substance of every sort. But in this case, the testator had obviated every quibble about the meaning of the word *effects*, for he had anxiously joined to it both epithets, *real and personal*; and through the whole sentence had been particularly studious of the most comprehensive language. To confine this clause therefore to personal estate, or to suppose *real effects* to be only descriptive of *chattels real*, would be offering violence to the obvious sense of the words and intention of the testator; who must be presumed to be unacquainted with the technical distinctions of property, and who, without more skill than falls to the share of persons in general, could not be apprised of the exact sense of the term *chattel real*. 2dly, There is no foundation in law or reason, for confining the words *real effects* to that species of property called *chattels real*; for *chattels real* are clearly personal estate, and would pass under the devise of *effects* without annexing to it the epithet *real*, or any other epithet. 3dly, It was evident, that by the devise of *all my effects real*, the testator intended to devise some property or effects which were *not personal*; but as reversionary terms for years are personal effects, he could not mean to devise them by this description; consequently, he must have intended to devise his real substance or estate. The second part of this objection would be answered, by observing, that the construction of the will here proposed, anticipated the argument derived from the supposed repugnancy; for the testator's first devise to his mother, was only a *part* of his real estate; creditors were entitled to another part, *i. e.* so much as should be sufficient by sale to discharge their incumbrances; the legatees, whose legacies were charged upon the real estate, were entitled to a further part thereof,

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of, *i. e.* to so much as would satisfy their legacies ; yet there still remained some part to dispose of ; and this remainder the testator had, with perfect consistency, given to his mother by the residuary clause. The views with which he thus made the two devises, were sufficiently obvious ; by the former in all events, and subject to no incumbrance, he made provision for the parent of the family ; by the latter, he referred to her disposal the *residuum* which might be, after all the incumbrances should be discharged, and the further objects of his care fulfilled. He had not therefore given *part* and *the whole* to his mother, as the plaintiff would contend. But even supposing there was an inconsistency in the two devises, the latter must controul the former ; such being the established rule of construction. Yet further ; if the construction proposed by the plaintiff was to prevail, a similar inconsistency would ensue, *viz.* between the clause giving his uncle the annuity, and the idea of his suffering the residue to descend to the same person, as heir at law ; for to give, or to suffer to take, is in common sense the same thing.

As to the second objection, the rule was admitted ; but it was contended, that in this case the heir at law was disinherited both by express words, and necessary implication ; for in the residuary clause the testator had made use of the most expressive, and comprehensive words, in giving to his mother the whole remainder of his real property, which, but for those words, would have descended to his heir at law ; and by necessary implication the real estate must pass to the mother, because the personal estate being totally absorbed by the personal legacies, not charged on the real estate, and his chattels real being barely sufficient to answer the annuity of 30 *l.* to his uncle, there remained no other fund for the residuary clause to operate upon, than the real estate. It could not be conceived, that the testator, in so solemn an act as his last will, should invoke the Deity to witness his hypocrisy and dissimulation to a parent, whom he mentioned with so much reverence and affection, and delusively giving her in idea, what he knew at the time she would never in fact enjoy.

Judgment
affirmed.
M. S. Jour.
sub anno 1776.
P. 135.

After hearing Counsel on this writ of error, the Judges were directed to deliver their opinions upon the following question ; *viz.* “ Whether the defendant in error, being the lessee of the “ devisees of *Mary Jackson*, be entitled to recover the estates in

“question

“ question, or any and which of them ?” And the Lord Chief Baron of the Court of Exchequer, having delivered the unanimous opinion of the Judges in the affirmative; it was thereupon ORDERED and ADJUDGED, that the judgment given in the Court of King’s Bench in *England*, reversing the judgment of the Court of King’s Bench in *Ireland*, should be affirmed; and that the record should be remitted, to the end such proceeding might be had thereon, as if no such writ of error had been brought into the House.

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Hans Wintrop Mortimer, Esq; and Robert Kirkman, } Appellants. Case 39.
Owen Lloyd, Clerk, } Respondent.

14th February, 1777.

IN *Michaelmas* Term 1773, the respondent exhibited his bill in the Court of Exchequer, as vicar of the parish of *Stapenhill*, in the county of *Derby*, against the appellants, setting forth, that the respondent was and for several years had been vicar of the said vicarage, and as such entitled by endowment, prescription, or otherwise, to all tithes of hay and grafs, and clover cut for hay, and to all small tithes arising within the parish, and particularly within the village, township or hamlet of *Caldwell* parcel of the said parish. That the appellants had severally been the owners and occupiers of divers farms, lands and tenements within the said hamlet, and that from *Midsummer* then last, they had divers titheable matters and things arising and growing on the lands so by them occupied; the tithes whereof became due, and ought to have been paid to the respondent: It was therefore prayed, that the appellants might be decreed to account with the respondent for the value of the said titheable matters and things, and pay to him what should appear to be due on the taking of such account.

The appellants, by their answer to this bill admitted, that they were occupiers of certain lands within the hamlet or village of
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Caldwell, in the parish of *Stapenhill*; but insisted, that the respondent was not entitled to any tithes in kind of any titheable matters arising within the said village or hamlet, either from the appellants or any other person whatsoever, owners or occupiers of any lands, tenements, or hereditaments, within the village, township, or hamlet of *Caldwell*, in respect of such lands, tenements or hereditaments, or any payment in lieu or in respect thereof; other than and except, that from time immemorial there had been paid by the inhabitants, proprietors and owners of lands and tenements within the said village, township, or hamlet of *Caldwell*, to the respondent and his predecessors, vicars of the said parish for the time being, the sum of 6 l. on the feast of St. *John* the Baptist, in every year, for and as a modus and full payment and satisfaction for and in lieu of all tithes, rights, compositions, obventions and emoluments whatsoever, due or payable to the vicar for the time being of the said parish of *Stapenhill*, from the inhabitants, proprietors and occupiers of lands and tenements within the said village or hamlet of *Caldwell*, in respect of such lands and tenements; and the appellants contended, that such modus or ancient payment of 6 l. had been confirmed by immemorial custom, as well as by a certain indenture, dated the 22d of *September* 1676, in the words following, viz.

“ Hæc indentura facta inter Willielmum Dominum Paget baronem de Beaudefert, verum et indubitatum patronum
 “ vicariæ perpetuæ ecclesiæ parochialis de Stapenhill in comitatu Derbiæ, Lichfeldiæ & Coventriæ diocesiâ &
 “ Johannem Lucas, artium magistrum, vicarium perpetuum
 “ ejusdem vicariæ perpetuæ ecclesiæ parochialis de Stapenhill
 “ antedictâ, ex consensu & assensu reverendi in Christo patris et domini domini, Thomæ, Providentia Divinâ Lichfeldiæ & Coventriæ episcopi, ex unâ parte; Samuelem
 “ Saunders de Caldwell, in comitatu & diocesiâ prædictis, armigerum, Edwardum Holland de eisdem, generosum,
 “ Elizabetham Aston, viduam, Thomam Webster, Thomam Collingwood, Willielmum Cox, Georgium Thrumpton, de eisdem, yeomen, Thomam Baxter, Richardum Capenhurst, Thomam Baker, de eisdem, husbandmen, Thomam Jackson, de eisdem, carpenter, Thomam Corbitt de eisdem, blacksmith, aliosque omnes & singulos incolas dictæ
 “ villæ

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“ villæ de Caldwell prædictâ, Ricardum Bath de Linton in
 “ comitatu Derbiæ prædictâ, et Robertum Nicklinson de
 “ Swadlincote, in comitatu Staffordiæ et diocesiâ præ-
 “ dictâ, shoemaker, proprietarios & occupatores quarundum
 “ terrarum infra eandem villam de Caldwell prædictâ jacen-
 “ tium, ex consimili consensu & assensu reverendi in Chris-
 “ to patris et domini domini, Thomæ Providentiâ Divinâ
 “ Lichfeldiæ et Coventriæ episcopi, ex altera parte; testatur
 “ quod, tam pro bono capella de Caldwell infra villam de
 “ Caldwell prædictâ & inhabitantium villæ prædictæ quam
 “ pro bono ecclesiæ parochialis de Stapenhill prædictâ, de
 “ qua quidem ecclesiâ de Stapenhill prædictâ, capella de
 “ Caldwell prædictâ membrum est, ac etiam pro et in con-
 “ sideratione acquitantiæ & finalis concordantiæ omnium
 “ differentiarum & controversiarum de et concernentium
 “ omnes & singulas decimas, oblationes, obventiones, com-
 “ positiones, aliaque jura & emolumenta ecclesiastica quæ-
 “ cunque vicario perpetuo vicariæ perpetuæ ecclesiæ paro-
 “ chialis de Stapenhill prædictâ, per inhabitantes, possessores
 “ & occupatores terrarum infra villam de Caldwell prædictâ
 “ jacentium debitas & solutas, agreeatum, concordatum &
 “ conclusum est, et per presentes, inter partes prædictas ex
 “ consensu et assensu ante dicti reverendi in Christo patris,
 “ concordatum est et conclusum, quod præfatus Johannes
 “ Lucas, vicarius perpetuus vicariæ perpetuæ ecclesiæ pa-
 “ rochialis de Stapenhill prædictâ, ejusque successores, vicarii
 “ perpetui ejusdem vicariæ perpetuæ, semel in qualibet
 “ mense annuatim in quolibet anno imperpetuum divinas
 “ preces in capella de Caldwell prædictâ, secundum formam
 “ libri communium precum leget et post lectionem earun-
 “ dum juxta morem ecclesiæ Anglicanæ concionabitur, præ-
 “ fatique incolæ de Caldwell prædictâ, ac proprietarii & oc-
 “ cupatores terrarum infra eandem villam jacentium, omnes
 “ et singuli eorumque hæredes, executores, administratores
 “ five successores eidem Johanni Lucas, & successoribus suis,
 “ vicariis perpetuis ejusdem vicariæ perpetuæ ecclesiæ paro-
 “ chialis de Stapenhill prædictâ, summam sex librarum legalis
 “ monetæ Angliæ, in plenam contentationem satisfactionem et
 “ exonerationem omnium & omnimodum decimarum jurium
 “ compositionum obventionum, oblationum juriumque et emo-
 “ lumentorum ecclesiasticorum quorumcunque infra eandem
 “ villam

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“ villam de Caldwell prædictâ qualitercunque, crescentium
 “ provenientium, renovantium aut aliquo modo contingen-
 “ tium eidem vicario perpetuo et quovis modo debitorum
 “ aut solvi consuetorum ad festum sancti Johannis Baptistæ
 “ annuatim in quolibet anno imperpetuum solvent idem-
 “ que Johannes Lucas, vicarius perpetuus antedictus,
 “ ejusque successores, vicarii perpetui vicariæ perpetuæ
 “ ecclesiæ parochialis de Stapenhill prædictâ, eandem
 “ summam sex librarum, in plenam contentationem, satis-
 “ factionem, solutionem et exonerationem omnium et sin-
 “ gularium decimarum, jurium, compositionum, obventio-
 “ num, oblationum & emolumentorum ecclesiasticorum quo-
 “ rumcunque prædictorum et ut præfertur quovis modo
 “ debitorum aut solvi consuetorum imperpetuum ad festum
 “ prædictum accipient et recipient. In cujus rei testimo-
 “ nium, partes ad presentes sigilla sua eisdem mutuo appo-
 “ fuerunt vicesimo secundo die mensis Septembris, anno
 “ regni domini nostri Caroli secundi, Dei gratiâ, Angliæ,
 “ Scotiæ, Franciæ, et Hibernæ, regis, fidei defensoris, &c.
 “ vicesimo octavo, annoque Domini 1676. Et nos episco-
 “ pus antedictus, in fidem et testimonium præmissorum, sigil-
 “ lum nostrum episcopale presentibus apposuimus.

The cause being at issue, several witnesses were examined on both sides. On the part of the respondent it was proved, that the village or hamlet of *Caldwell* was part of the parish of *Stapenhill*, and that the inhabitants of *Caldwell* contributed to the repairs of *Stapenhill* church. It was also proved, that the vicar of *Stapenhill* for the time being, had, as far back as the memory of witnesses went, collected and received tithes in kind for all hay, clover, lamb, wool, fruits, eggs and pigs, and other small tithes arising within the other parts of the parish, not parcel of the village of *Caldwell*. On the part of the appellants it was proved, that *Caldwell* was a chapelry, in which there was a chapel of some antiquity, repaired by the inhabitants of the hamlet of *Caldwell*. It was also proved, that the sum of 6*l.* had been raised by a levy according to the pound rate, and paid for many years to the vicar of *Stapenhill* for the time being; and they likewise proved, that tithes in kind of the several articles claimed by the bill, had not, during the memory of living witnesses, been paid to the vicar of *Stapenhill*.

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On the 11th of *December* 1775 the cause was heard, when there were produced and read on the part of the respondents the above indenture; an exhibit marked (C) being a terrier dated 23d of *June* 1665, signed by *John Lucas* and others, wherein was the following entry, viz. “*Item*, pigs, geese, wool and lamb, “are paid in the parish of *Stapenbill* and town of *Caldwell*, according to the antient law, *fætus ab lactatus debet esse ante quam præstetur* (to wit) when they are weanable, or of strength to live without the dam. *Item*, hay, hemp, flax, calves, colts, all manner of fruit and *Easter* offerings, are paid in the parish, and from all the town of *Caldwell*, without exception, for this vicarage antiently was endowed *omnibus minutis decimis*.” Another terrier dated the 29th of *September* 1719, wherein was the following entry, “All manner of tithes (excepting corn only) as pigs, geese, wool, lambs, calves, colts, eggs, hay, hemp, flax and all manner of fruit and *Easter* offerings, have formerly been paid in kind to the vicar of *Stapenbill*, by the inhabitants of *Caldwell*. But by an agreement made between the vicar and the said inhabitants, bearing date *September*, 22d 1676, by the consent of the patron and Lord Bishop, declared by their being parties to the same, the said inhabitants pay in lieu of all tithes and profits due from thence to the vicar, the sum of 6*l.* yearly, on St. *John Baptist’s* day, which the chapel warden gathers and pays the day it becomes due.” And three other terriers dated the 12th of *July* 1726, the 3d of *October* 1701, and the 2d of *February* 1705. And on behalf of the appellants, there was produced and read, a terrier dated the 23d of *June* 1682, wherein was contained the following entry, viz. “*Item*, geese, wool and lambs, “are paid in the parish of *Stapenbill*, excepting *Caldwell*, according to the antient law, *fætus ab lactatus debet esse quam præstetur* (to wit) when they are weanable, or of strength to live without the dam. *Item*, six pounds of monies paid from the town of *Caldwell*, hay, hemp, flax, calves, colts, all manner of fruit and *Easter* offerings, are paid in the parish, excepting *Caldwell*, for this vicarage antiently was endowed, *omnibus minutis decimis*.”

On reading this written evidence and the depositions, the Court decreed, that it should be referred to the Deputy Remembrancer, to take an account of what was due to the respondent

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from the appellants respectively, for the value of the tithes demanded by the bill; and that they should pay to the respondent, what, upon such account, should be found due to him, for the value of the said respective tithes.

A. Wedderburn,
G. L. Newnham.
J. Madocks.

From this decree the appellants thought proper to appeal; and on their behalf it was said, that terriers signed by the incumbent entitled to tithes, and by the church wardens, or inhabitants of the parish, who are liable to the payment of tithes, are admitted to be read in evidence as the declarations of parties standing in opposite interests, but both interested in the manner of rendering tithes within the parish; and no terrier is perfect, or ought to be admitted in evidence, if signed by the incumbent only, or by the inhabitants only. The above terrier of 1665, which was received in evidence in this cause, appeared to be signed by *John Lucas*, the vicar, and by four persons who were stiled church wardens, and were to be presumed to be the church wardens of the church of *Stapenbill*, which was the parish church, and not the chapel wardens of the chapelry of *Caldwell*. It was therefore improper to be admitted in evidence, as only one of the parties signing it was interested in the payment of tithes in *Caldwell*, namely, the vicar; and it was no more admissible in evidence respecting the payment of tithes in *Caldwell*, than a terrier signed by the vicar of *Stapenbill*, and the inhabitants of a neighbouring parish. It was undoubted in this cause, that the vicar's right to tithes in kind within the chapelry of *Caldwell*, was denied 100 years ago; for by an agreement, with the concurrence of the parson, patron and ordinary, which there was no reason to suspect to have been unfair, a certain annual payment was recognized and established; not as a composition for tithes payable in kind, but as a compromise of a disputed claim. That by means of this agreement having so long subsisted, all memory and trace of any other payment was lost and obliterated; and therefore under these circumstances, it was unequitable to permit the vicar to avail himself of his general title.

J. Skynner.
Ll. Kenyon.

On the other side it was said, that the respondent had proved his right to the several species of tithes claimed by his bill, in other parts of the parish, and there was no pretence that any
whether

body else had any title to tithes in kind ; the single question was, whether the payment of 6 *l.* was a legal exemption from tithes in kind ? Now there was no evidence that the payment existed before the deed of *September* 1676, the terriers were evidence to the contrary ; and the deed did not contain any declaration of, or reference to any modus, or customary payment then existing within the parish ; but on the contrary, from the whole tenor and effect of this deed, it appeared to be nothing more than an ineffectual attempt to make a real composition, at a time when all the parties to it were by law disabled from so doing. The deed, therefore, instead of maintaining the pretensions of the appellants, afforded the strongest presumption, that no such modus or customary payment as was now contended for, could have existed when that deed was executed ; for otherwise it must be presumed, that such modus must have been known to the inhabitants of the village of *Caldwell*, who were parties to the deed ; and it was highly unreasonable to suppose, that they would have omitted to take notice of such modus, or customary payment, in case any such had then existed. Neither did the appellants parol evidence amount to any proof of this pretended modus ; in fact it amounted to nothing more than proof of an acquiescence under the temporary composition, introduced for the first time, by the deed of 1676, on the part of the several vicars of *Stapenbill*, since the making of that deed ; but such acquiescence was not in any sort binding or conclusive upon the respondent.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed ; and the decree therein complained of, affirmed.

DECREE
affirmed.
M. S. Jour.
sub anno 1777.
p. 214.

Case 40. *George Healey*, Gent. - - Appellant.
Thomas Copley, Esq; and others. - Respondents.

10th March, 1777.

ROBERT COPLEY, Esq; being in his life time, and previous to the 9th of July 1765, seised in fee simple of divers freehold estates in the parish of *Doncaster*, and in several other parishes in the county of *York*, and being desirous of making a settlement thereof, executed certain indentures of lease and release, dated the 12th and 13th of July 1765, the release being tripartite, and made between the said *Robert Copley* of the first part; the respondent *Thomas Copley* (by the name and description of *Thomas Newby*, otherwise called *Thomas Copley*, son of *Anne Newby*, deceased) of the second part; and Sir *Bryan Cooke*, Bart. and *Christopher Hodgson*, doctor of physic, of the third part; whereby the said *Robert Copley*, in consideration of natural love, and of 10*s.* and for other good causes and considerations, did grant, alien, release, confirm, limit and appoint, unto Sir *Bryan Cooke*, and *Christopher Hodgson*, their heirs and assigns, all and singular his freehold estates therein specified and described; to hold to the same, to the said Sir *Bryan Cooke*, and *Christopher Hodgson*, and their heirs and assigns, to the use of the respondent, *Thomas Copley*, during the term of his natural life, without impeachment of waste; with remainder to the said Sir *Bryan Cooke*, and *Christopher Hodgson*, and their heirs, to preserve contingent remainders; with a power therein contained, for the respondent *Thomas Copley* to make a jointure on any wife he should marry, in the manner, and with the restrictions therein expressed; with remainder to the use of the first and other sons of the body of the respondent, *Thomas Copley*, in tail male; remainder to the respondent *Henry Cooke*, and the heirs male of his body; remainder to the respondent *John Woodyear*, and the heirs male of his body; remainder to the respondent *George Cooke*, and his heirs for ever. And in the said indenture of release was contained a proviso, that it should be lawful for the said *Robert Copley*, at any time during his life, by any deed or writing under his hand and seal, attested by three or more creditable witnesses, or by his last will and testament in writing,

writing, to be by him signed, sealed and published, in the presence of the like number of witnesses, absolutely to revoke, annul, and make void, or to alter or change all, any, or every of the uses, estates, or trusts therein before created, limited and appointed, of or concerning the said premises, or any part thereof, at his will and pleasure, and by the same deed or writing, to be attested as aforesaid, to limit, declare, or appoint such new or other uses, estates, or trusts thereof, as to him should seem meet.

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Robert Copley being also seised in fee of divers copyhold or customary estates, holden of several manors in the said county of *York*, (all which copyhold or customary estates he had duly surrendered to the uses of his will) and being desirous of making a settlement or disposition thereof, in like manner as he had already done of his freehold estates, and with a view and intention to confirm the disposition and settlement so made of his freehold estates, by the before mentioned indentures of lease and release; duly made and published his will, dated the 15th of the said *July* 1765, and thereby, as to all and singular his copyhold estates therein specified and described, he gave and devised the same to the said *Sir Bryan Cooke*, and *Christopher Hodgson*, and their heirs, executors, administrators and assigns, to the use of the respondent *Thomas Copley*, and his assigns, during the term of his natural life, without impeachment of waste; with remainder to the said *Sir Bryan Cooke*, and *Christopher Hodgson*, and their heirs, during the life of the said *Thomas Copley*, in trust to preserve contingent remainders (with a like power for *Thomas Copley* to make a jointure on any wife he should marry, with the same restrictions as in the indenture of release); remainder to the first and other sons of the respondent *Thomas Copley*, in tail male; with remainder to the respondent *Henry Cooke*, in tail male; with remainder to the respondent *Godfrey Wolley*, in tail male; with remainder to the respondent *John Woodyear*, in tail male; with remainder to the respondent *George Cooke*, in fee. And the testator, after reciting the said indentures of lease and release, of the 12th and 13th of the same *July*, did order and direct, that the respondent *Thomas Copley*, should immediately after his decease, take upon him the surname of *Copley*, and write and stile himself by that surname; and in case he should refuse so to do, or after having taken upon himself such surname,

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should at any time during his life, take upon himself any other surname than that of *Copley* only, then and in such case, the testator did by virtue of the powers reserved to him by the said recited indentures declare, that such grant and conveyance, so far as related to the respondent *Thomas Copley*, and his children, should be immediately void; and he did in that case, give and devise all his freehold messuages, tenements and hereditaments, and all his copyhold messuages, tenements and hereditaments, and all his personal estate, unto the first remainder-man who should be entitled to the same, by virtue of the said grant and conveyance, and his said will, and who should take upon himself the surname of *Copley* only, and during his life write, and stile himself by that name only, and to the first and other sons of his body, taking such and the same estate, as the respondent *Thomas Copley* would have taken, by virtue of the said grant and conveyance; and further, that as often as any of the persons in remainder, who should be entitled to his said freehold, copyhold, and personal estates, should refuse to take upon himself, and write and stile himself by the said surname of *Copley* only, then that the said grant and devise, as far as related to such persons, should be null and void; and that his said freehold, copyhold, and personal estates, should go and descend to the next in remainder, by virtue of the said grant, and his will, who should take upon himself, and write and stile himself by the surname of *Copley* only.

Sir *Bryan Cooke*, and *Christopher Hodgson*, the trustees named in the said settlement and will, both died in the life time of the testator, but *Christopher Hodgson* survived Sir *Bryan Cooke*; and the respondent *Smith* was the heir at law of the said *Christopher Hodgson*.

The testator died in *October* 1771, without lawful issue, and without altering or revoking his will, leaving the appellant *George Healey*, his heir at law on the part of his father, and the respondent *Robert Deighton*, his heir at law on the part of his mother; and upon his death, the respondent *Thomas Copley*, entered into possession of the testator's said freehold and copyhold estates, and as the only surviving executor named in the will, duly proved the same.

After

After the testator's death, and after the will had been perused, a strict search was made after the deeds therein recited, but they could not be found, and the same were, by accident, either mislaid or lost; but as an evidence of the existence thereof, and of the testator's desire that the same should be preserved and take effect, a paper writing of his own hand writing, was, very soon after his death, found among his papers, in the words and figures following, viz. "To my son *Thomas Copley*, memorandum 1765, "never keep any writings or papers of consequence in the iron chest, because it is screwed to the floor, and I would advise my son, by all means, to have my deed of gift to him, to be enrolled in Chancery. *Robert Copley* 1765."

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In *Hilary* Term 1772, the respondent *Thomas Copley*, exhibited his bill in the Court of Chancery, against the appellant, as the heir at law of *Robert Copley*, on the part of his father, the respondent *Deighton*, as the heir at law of *Robert Copley*, on the part of his mother, the respondent *John Silvester Smith*, as the heir at law of *Christopher Hodgson*, the surviving trustee in the settlement and will, and against the respondents *Henry Cooke*, *Godfrey Wolley*, *John Woodyeare*, and *George Cooke*; stating the several facts above mentioned, and praying, that the said indentures of the 12th and 13th of *July* 1765, and the will of the said *Robert Copley*, might be established, and that the witnesses thereto might be examined, and their testimony recorded, in order that the same might be perpetuated; and that the said *George Healey*, and *Robert Deighton*, might be admitted to the said several copyhold estates, and might, after such admittance, surrender the same to such uses, and upon such trusts, as in the said will were declared; and that proper trustees might be appointed of the said estates, and that the same might be settled to such uses, and on such trusts as were mentioned in the said indenture of release, as far as concerned the respondent, and his issue male.

To this bill the appellant put in his answer, and thereby contested the execution of the said indentures of lease and release, as well as of the will; and insisted that he, as heir at law of *Robert Copley*, was well entitled to all his freehold and copyhold estates. And the several other defendants put in their answers, and the respondents *Henry Cooke*, *Godfrey Wolley*, *John Woodyeare*, and *George Cooke*, claimed to be entitled, under the indentures of lease

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lease and release, as well as under the will of the said *Robert Copley*, to such estates in remainder in his freehold and copyhold estates, as before stated.

On the 3d of *August* 1772, the appellant exhibited his cross bill, against the respondent *Copley* only; praying, that he might be decreed to deliver up to him the possession of all the freehold and copyhold estates, of which *Robert Copley* was seised at the time of his death, and for an account of the rents and profits thereof; suggesting, that under a settlement made on the marriage of the father and mother of the said *Robert Copley*, he was tenant in tail of all his said freehold estates, and that he had never done any act to bar such entail: And therefore, the appellant claimed to be entitled as heir in tail, under the limitations in the said settlement, or as heir at law of the said *Robert Copley*.

The respondent *Copley*, by his answer to this cross bill, stated sundry conveyances executed, and recoveries suffered by *Robert Copley*, of the said freehold estates, by virtue of which the respondent *Copley* insisted, that the testator *Robert Copley* was, at the time of making the said indentures of lease and release, of the 12th and 13th of *July* 1765, seised in fee simple of the several freehold estates comprised therein, as well as of the copyhold estates devised by the will.

On the part of the plaintiff in the original cause, it was proved, that the testator, when he gave instructions for preparing the abovementioned conveyance and will, directed, that after the limitations to his son, the respondent *Thomas Copley*, and his heirs male, a large blank should be left in the conveyance and will, in order that he might insert limitations to four friends, whom he intended should have the estates, in case his son should die without issue male; that such blanks were accordingly left in the release and will, and that at the time they were executed, the testator with his own hand filled up those blanks, first in the release, and then in the will. And the attorney who prepared them, proved, that in the blank left in the release, he saw the testator write the word *Henry*; but that the testator afterwards cautiously held his arm over the parchment, in such a manner as prevented the witness from seeing him write any more than the word *Henry*. And the said attorney also identified and proved the draft of the release, in which the blank was left, pursuant to the testator's order.

On

On the 4th of *May* 1775, both causes were heard before the Lord Chancellor *Bathurst*, when upon reading the testator's will, and the depositions taken in the cause, his Lordship ordered, that the parties should proceed to a trial at law, at the then next assizes for the county of *York*, on the following issue, viz. "Whether *Robert Copley* deceased, by the paper writing, dated the 15th day of *July* 1765, devised his freehold and copyhold estates, or either of them?" And gave the usual directions for settling the issue, in case the parties differed about the same. And his Lordship reserved the consideration of costs, and of all further directions, till after the trial should be had, and any of the parties were to be at liberty to apply to the court, as there should be occasion.

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In pursuance of this order, the issue was tried by a special jury, at the summer assizes 1775; upon which trial the jury delivered their verdict in the following words, viz. "They say upon their oath, that the within mentioned paper writing was duly executed to pass freehold estates, and that the copyhold estates therein mentioned were well devised thereby; and that the deeds of 1765, mentioned in the said paper writing, were executed by the within named testator, *Robert Copley*, Esq; and existed at his death."

The appellant acquiesced under the verdict, and never made any application to the court for a new trial; and therefore, the cause was set down again to be heard, as to the matter of costs, and for further directions. And was accordingly heard on the 25th of *November* 1775, when his Lordship was pleased to order and decree, that the testator's will should be established, and the trusts thereof performed and carried into execution; and that the cross bill, so far as it sought to be let into possession of the copyhold premises, should stand dismissed; and that the rest of that bill should be retained for six months; and it was ordered, that the appellant, the plaintiff in the cross cause, should be at liberty in the mean time to bring an ejectment to recover possession of the freehold estate, and proceed to trial therein; at which trial, by consent, the respondent *Copley* was to admit the appellant to be the testator's heir at law; and by the like consent, the appellant was not to contest the due execution of the will, and to admit, that the respondent was, on the 12th of *July* 1765, seised in fee

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simple of the said freehold premises; and in default of the appellant's bringing such ejectment, and proceeding to trial by the time aforesaid, the cross bill was to stand dismissed, with costs to be taxed: And his Lordship reserved the consideration of the costs of those causes, and also the costs at law in respect of the issue then tried, and of all further directions, till after the trial of the said ejectment, or the appellant's default in bringing such ejectment, and proceeding to trial by the time aforesaid; with liberty for any of the parties to apply to the Court, as there should be occasion.

In consequence of the liberty given to the appellant by this order, he brought an ejectment; but before the next assizes, viz. on the 23d of *January* 1776, he moved the Court, that the said order of the 25th of *November* 1775, might be varied, by striking out so much thereof as directed the rest of the cross bill to be retained for six months, and gave liberty to the appellant to bring an ejectment for the recovery of the possession of the freehold premises therein mentioned, together with the directions relating thereto; and also so much thereof as reserved the consideration of further directions and costs; and by inserting, instead thereof, such further directions in the causes as the Court should be of opinion ought to be given; whereupon, and upon hearing what was alledged by the counsel for the parties, and the appellant by his counsel then waving so much of the said order as directed the cross bill to be retained, with liberty to bring an ejectment, his Lordship was pleased to order, that the said causes should be set down to be heard on the equity reserved, next after the rehearings and appeals then appointed.

In pursuance of this order, on the 18th and 19th of *March* 1776, the causes came on to be heard, when his Lordship was pleased to order, that the cross bill should be dismissed; and in the original cause his Lordship ordered, that the will of the testator *Robert Copley* should be established, and the trusts thereof performed and carried into execution; and as to the freehold estates, his Lordship declared, that the same were, by virtue of the said indentures of the 12th and 13th of *July* 1765, vested in the respondent *Copley*, for the term of his natural life, without impeachment of waste, with such powers as in the said indenture of the 13th of *July* 1765 were mentioned, subject to the proviso mentioned in the will concerning the same; with

with remainder to trustees, to support contingent remainders; with remainder to his first and other sons in tail male; with such remainders over, as were in the testator's will declared concerning the copyhold estates, in favour of the respondents *Cooke, Wolley* and *Woodyeare*, and their respective issue male; with remainder to the respondent *George Cooke*, his heirs and assigns for ever. And the Master was to tax all parties their costs of the said suits, and also at law on account of the issue, and such costs were directed to be paid to them accordingly, and to be raised by mortgage of a sufficient part of the testator's real estates, with the approbation of the Master; and it was ordered, that the respondent *Copley* during his life, should keep down the interest of the money to be raised by such mortgage.

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From so much of this decree as related to the freehold estates, the present appeal was brought; and on behalf of the appellant it was argued, that if a person executes a voluntary deed, and does not part with it out of his custody, he may if he pleases destroy it; and if he does, the deed cannot be supported, or have any effect. That it is not absolutely necessary to give proof of the destruction of a deed by the grantor; for such evidence is, in many cases, impossible to be had, but the Court will presume his having destroyed it, from circumstances. That it has hitherto been the uniform opinion and rule of Courts of Equity, that a voluntary deed, especially if made in favour of a stranger, shall not be aided, nor the party claiming under it relieved in a Court of Equity; and except the decree now complained of, there is no instance of a person claiming under such a voluntary deed, having been favoured, or aided by the Court. In this case, the deeds in question were voluntary, in favour of a natural son; and *Robert Copley* the grantor, the moment they were executed, took them into his own custody, and they were never afterwards, for any time out of his possession, or in fact seen by any person; nor had the respondent *Copley* sworn, that they were found in the testator's possession at his death; though it appeared, that he was very careful of his deeds and papers, and that all of them, except the deeds in question, were found deposited very safely and regularly. Though the estates lay in a registered county, yet he would not have any memorial of the deeds in question registered; and though by them he was made to convey his estates immediately to the respondent

E. Thurlow.
C. Ambler.
R. Hollit.

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spondent *Thomas Copley*, yet he continued in possession of all his estates till his death. These circumstances proved, beyond a doubt, that *Robert Copley*, by executing the deeds in question, never meant to put the estates in the least out of his power, or to give the respondent *Copley* any interest, which he could not at any moment destroy; and they likewise afforded the strongest presumption, that he himself actually destroyed these deeds; a presumption wholly uncontradicted by any evidence on the part of the respondent.

It might possibly be objected, that if *Robert Copley* destroyed the deeds, he would have destroyed the will also: But this inference by no means follows, for he might have altered his mind as to the extent of the provision he meant for the respondent *Copley*, and have thought his copyhold and personal estate a sufficient provision for him. Besides, an heir at law is not to be disinherited by presumption, or inference. It was unnecessary to take any particular notice of that part of the verdict, which found that the deeds in question existed at *Robert Copley's* death, because that finding was totally foreign to and unsupported by the issue; which was directed only to try the validity of the will, and whether the freehold as well as the copyhold estates passed by it, and in consequence, it was made no part of the ground for the decree complained of. But should it be objected, that the appellant had an opportunity given him of trying his title to the estate by an ejectment, which he declined doing; it might be answered, that the respondent *Copley*, as the case stood, was not entitled under the deeds to any relief or assistance in a Court of Equity, but his bill ought to have been dismissed. And as the appellant might at any time, if necessary, have tried his title at law, without the interference of the Court of Chancery; it was therefore thought highly improper for him to proceed to try an ejectment, under the direction of that Court; and by thus declining the trial of the ejectment, he brought back the causes to the same state in which they were, when the order of the 25th of *November 1775*, was pronounced.

But admitting for a moment, that there was a propriety in the Court's declaring, that *Robert Copley's* freehold estates were, by virtue of the deeds in question, vested in the respondent

Thomas

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Thomas Copley for his life, with remainder to the issue male of his body; there was surely no ground for the Court to proceed further, and declare the estates to be so vested with such remainders over, as were in *Robert Copley's* will declared concerning the copyhold estates, in favour of the respondents *Cooke, Wolley* and *Woodyear*, and their respective issue male, with remainder to the respondent *Cooke*, his heirs and assigns for ever. It was not stated by the respondent *Copley's* bill, that there were in the release of *July 1765* any such limitations, or indeed any limitations over in default of issue male of his body; the bill only prayed a conveyance to the respondent and his heirs male. And the evidence given on his part, so far from proving that the names of the other respondents were inserted in the remainders, proved directly, that *Robert Copley* was so cautious in that particular, that no person whomsoever could see or know what the remainders were; and there was no evidence on the part of the other respondents. But on their behalf it was said, that *Robert Copley* had by his will, given his copyhold estates to them in remainder, and that he inserted those limitations in the will; and therefore it must be presumed, that the limitations in the release were the same. If, however, these respondents could derive any benefit from such a presumption, they would have full opportunity of doing it at law, whenever their claim to the succession of the estates should arise; but it could be no reason for a Court of Equity to declare them entitled to the estates, even if a suit was instituted by them; much less so in one, wherein they were defendants, and brought before the Court only as devisees under *Robert Copley's* will, and in which their claim to the freehold estate was not even stated. And should it be objected, that the Court could not declare the rights of the parties by halves, and that having declared the right of the respondent *Thomas Copley*, and the issue male of his body, it must necessarily proceed to declare the rights of the other respondents as persons in remainder; the objection itself was one of the strongest reasons which could be given, why no decree ought to have been made in favour of the deeds.

On behalf of the respondent *Thomas Copley*, it was contended, that it was not competent to the appellant to complain of the decree of the 19th of *March 1776*, respecting the freehold estates, which as to him, and so far as it varied from the former decree

A. Wedderburn:
J. Madocks:

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of the 25th of *November* 1775, was plainly grounded upon his own application, in consequence of a proposal accepted by him to receive his costs, and waive any legal right he might have to contest the respondent's title. The respondent was in possession of the freehold estates; the execution of the will had been established, and was admitted; the execution of the deeds had been proved, and that they existed at the death of *Robert Copley*. The operation either of the deeds or the will, was sufficient to bar the appellant; and though the verdict of the jury was not a literal answer to the issue, yet it found a fact equally decisive against the appellant; still however, the Court thought fit to indulge him with an opportunity of establishing, if he could, a legal title in himself; and more it was impossible for him to expect. This he had thought fit expressly to waive, upon the terms of receiving costs, to which he could not otherwise have been entitled; and therefore it was conceived, he was as much bound by the decree, as he would be by an express consent, or by a release at law.

But if, after all, the appeal was proper, yet by the evidence on the part of the respondent, produced and read at the hearing of the causes, the fact of the execution of the deeds, as well as the effect and contents of them, were established beyond a possibility of doubt. The respondent was also in possession of a verdict, by which those deeds were found not only to have been executed by the testator *Robert Copley*, but to have existed at the time of his death; and the testator, by his will, manifestly and expressly referred to them, as a disposition of his real estate then subsisting. The appellant did not in any sort impeach that part of the decree which related to the copyhold estates, or of the verdict found on the trial of the issue, whereby the testator's will was established; and it was conceived, that the admission of the will, as duly executed and unrevoked, necessarily inferred the existence of the deeds, as subsisting instruments at the testator's death; because those deeds were not only mentioned and referred to in the will, as instruments then existing, but were virtually incorporated into it, and ratified by it, and were therefore to be considered in a manner as constituting part of it.

J. Wallace.
J. Dunning.

The same reasons, in substance, were offered on the part of the other respondents, the remainder-men.

Cases in Parliament.

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After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of affirmed: And it was further ORDERED, that the appellant should pay to the respondents 100 l. for their costs in respect of the said appeal.

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DECREE
affirmed.
M. S. Jour.
sub anno 1777.
p. 380.

Winifred Lawson, widow, - Appellant. Case 41.

John Lawson, Francis Stuart and Mary } Respondents.
his wife, - - - }

28th April, 1777.

HYLTON LAWSON, Esq; the appellant's late husband, by his will, dated the 14th of *April* 1748, charged all his copyhold and freehold estates therein mentioned, as also all his personal estate (except 300 *l.* which he received as part of the fortune of the appellant, and which was then lent out upon bond to *John Hylton*, Esq; and then undischarged; and which 300 *l.* he gave to the appellant, declaring it to be his full intention, that it should go entire to her) with the payment of his debts, legacies and funeral expences, and directed them to be discharged by mortgage, or sale of such of his said freehold and copyhold lands, as should be sufficient to discharge the same, with all his personal estate (except the said 300 *l.*) and he also gave the appellant, during her life, an annuity or yearly rent charge of 100 *l.* to be issuing out of his copyhold estates; which annuity, she was on his death entitled to receive out of such copyhold estates, under her marriage articles, dated the 12th of *February* 1737, though it was not so mentioned in his will; and he also left to the appellant, as long as he should choose to live in it, his messuage at *Chirton*, with the appurtenances; and after giving some other legacies, he bequeathed to the appellant, all her wearing apparel, with her watch and rings, and appointed her sole executrix; but he made no further disposition of the residue of his personal estate.

John

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John Hylton, to whom the 300 *l.* was lent, as mentioned in the will, died in the testator's lifetime, much involved in debt; and a suit having been after his death instituted in Chancery, for applying his estate in payment of his debts, and the testator being made a defendant in that suit, he in his answer stated the said debt of 300 *l.* and afterwards, on making a dividend of the estate of *John Hylton*, of 17 *s.* in the pound amongst his creditors, the testator received that dividend in respect of the said bond debt.

The testator died on the 14th of *November* 1767, within the province of *York*, where he was a settled inhabitant, without revoking his will, otherwise than by receiving 17 *s.* in the pound on the said debt; leaving the appellant his widow, and the respondent *John Lawson*, and *Mary Nicolson* his nephew and niece, and only next of kin.

The appellant soon afterwards proved the will, and possessed the personal estate of the testator, out of which she paid his debts, legacies and funeral expences.

Mary Nicolson died in *July* 1769 intestate; and administration of her personal estate was granted to *William Nicolson*, one of her two children.

On the 31st of *August* 1770, the respondent *John Lawson*, and the said *William Nicolson*, filed their bill in the Court of Chancery against the appellant, claiming title with the appellant, to the whole surplus of the testator's personal estate and effects, as undisposed of; and praying an account thereof, and that the clear residue might be distributed amongst the appellant and the plaintiffs in moieties, according to the statute of distribution of intestate's estates.

To this bill the appellant put in her answer; and thereby stated, that the testator was an inhabitant of, and died within the province of *York*, and she claimed the whole legacy of 300 *l.* under his will; and insisted, that as the testator had not by his will disposed of the residue of his personal estate, such residue was distributable according to the custom of the said province of *York*, and the statute of distribution, and consequently that she,

as his widow, was entitled to one half under the custom, and to a moiety of the other half under the statute; and that the next of kin were entitled to the other moiety of the last half, being one fourth of the whole, under the said statute.

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The said *William Nicholson* having died intestate, the respondent *Mary Stuart* obtained administration to him, and the suit was on that occasion revived.

On the 7th of *March* 1772, the cause was heard before the Lord Chancellor *Bathurst*, who was pleased to declare, that the appellant was to be considered as trustee of the testator's residuary personal estate, beyond the 300*l.* debt specifically bequeathed to her, and that such residue was to be divided according to the custom of the province of *York*, by which the appellant would be entitled to one moiety of such residue, and also to a moiety of the remaining moiety; and that the other moiety of such remaining moiety belonged to the respondents: And his Lordship directed the proper accounts to be taken, and that the clear surplus of the said personal estate should be accordingly divided between the appellant and the respondents, in such shares as aforesaid, and all parties were to be paid their costs to be taxed, out of the estate.

The respondents being dissatisfied with that part of the decree, which declared that the appellant was entitled to a moiety of the residue of the testator's personal estate, according to the custom of the province of *York*, and which gave directions for the appellant's retaining one moiety of such residue in that right; procured an order, that the cause should be reheard as to that particular. And the appellant being advised, that there was error in the decree, in declaring that she was to be considered as a trustee of the testator's residuary personal estate, and in all the directions given in consequence thereof, obtained an order, that the cause should be reheard as to that matter.

Accordingly, on the 11th and 18th of *May* 1776, the cause was heard before the Lord Chancellor, when his Lordship was pleased to order, that the appellant's petition of rehearing should be dismissed; and to declare, that the appellant was to be considered a trustee of the testator's residuary personal estate, beyond the

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300 *l.* debt specifically bequeathed to her, and that such residue was to be divided according to the statute of distribution of intestate's estates, by which the appellant was to be entitled only to one moiety of such residue, and that the other moiety belonged to the respondents in manner following; *viz.* one moiety of such moiety to the respondent *John Lawson*, as one of the testator's next of kin; and the other moiety of such moiety to the respondents *Francis Stuart* and his wife, as she was the administratrix of *Mary Nicholson*, deceased, the other next of kin of the testator. And it was further ordered, that the clear residue of the testator's personal estate should be distributed between the parties in such proportions; and with such variations, it was ordered, that the former decree should be affirmed.

A. Wedderburn,
J. Ord.
W. Ainge.

The appellant conceiving that both these decrees were erroneous, appealed from them; and on her behalf it was said to be evident from the testator's will, that he did not consider the gift to the appellant of the 300 *l.* lent on bond to *John Hylton*, as any bounty from himself, but merely as her own money, placed out on security for her own benefit, liable to his debts, though not liable to be taken from her by his next of kin; he therefore meant to pen his will so as to secure to her what he considered as her own, and made her executrix, that in case he should live to increase his personal estate, she might be beneficially interested by being executrix. It appeared also to have been the testator's intention, that no body but his wife should be interested in the residue of his personal estate, after payment of his debts, because every legacy given by the will was charged upon his real estate in the first instance; and this intention seemed to be founded in justice and reason, as the testator's next of kin were very remote relations; and it could not be supposed, that he meant merely to give his wife trouble, by making her executrix, but which would be the case, if she was not entitled to the surplus. The legacy to the appellant of her wearing apparel, was no bounty from the testator, they being in their nature her paraphernalia; and though liable to his debts, yet had the creditors taken them, she would have been entitled to satisfaction out of his real estate, whether he had so directed by his will or not. But supposing the decrees to be right, in declaring the appellant to be a trustee of the residue of the testator's personal estate, beyond

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yond the 300 *l.* given to her, yet as to such residue, the testator must be considered as dying intestate; and the custom of *York* being the law of the place where he resided and died, his effects must be distributed accordingly; so that one moiety would belong to the widow, as he died without children, and the other moiety would be distributable between her and the next of kin. Though this rule clearly obtains upon a legal intestacy, and the appointment of an executor is in a court of law considered as a total disposition of the personal estate; yet when a Court of Equity declares a man, an inhabitant of the province of *York*, to die intestate as to the whole or any part of his personal estate, it does necessarily declare at the same time, that he has not exercised so far the power of devising. The statute 4 *William III.* c. 2. enabling an inhabitant of the province of *York* to dispose of the whole of his personal estate by will, cannot affect a case where no disposition is made; nor can there be a different rule of succession in a Court of Equity and a Court of Law, either as to personal or real estates. It was therefore hoped, that both the decrees would be reversed, and the respondents bill dismissed.

On the other side it was argued, that as to the first point made by the appellant, namely, that it ought to have been declared, that she was entitled to the whole surplus for her own benefit; nothing is more clearly established, than that, although by the common law, the appointment of an executor in a will, is a gift of the residue or surplus of the personal estate to such executor, yet in equity, if the executor has a particular legacy given him by the will, he thereby becomes a trustee of the surplus, for the benefit of those who may be entitled by the general law of the land. The appellant's counsel endeavoured to distinguish between a general and specific legacy; but if such distinction has in any case prevailed, which was denied, yet it was insisted, that in the present case the appellant could not avail herself of it; because her legacy of 300 *l.* though made a charge upon a particular fund, was payable also out of the general assets of her husband, and was so claimed by her answer. Besides, this claim to the whole surplus, was never so much as pretended by the appellant's answer; and therefore not being put in issue, or made part of her case, she was strictly not entitled to insist upon it; and especially, after having submitted to pay part of such surplus to the respondents,

E. Thurlow.
J. Madocks.
F. Buller.

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dents, under an order made in the cause, on the 18th of December 1771.

And as to the other point insisted on by the appellant, viz. that she ought to have been permitted to retain one moiety of the clear surplus, as the widow of the testator, under the custom of *York*; it was said, that this question depended upon the construction of the statute, 4 *Will. & Mary, c. 2.* by which the inhabitants of the province of *York* are enabled to dispose of their whole personal estate by will, notwithstanding the custom. The words of this statute are, “ That it shall be lawful for such
“ inhabitants, by their last wills and testaments, to give, be-
“ queath and dispose of all their goods, chattels, debts and other
“ personal estate, to their executor or executors, or to such
“ other person or persons as such testator shall think fit, in as
“ large and ample manner, as by the law and statutes of this
“ realm, any person may give and dispose of the same in the
“ province of *Canterbury*, or elsewhere; and that the widows,
“ children, and other the kindred of such testator or testators,
“ shall be barred to claim or demand any part of the goods,
“ chattels, or other personal estate of such testator, in any other
“ manner than as by the said last will and testament is limited
“ and appointed.” Before this statute, such inhabitant could only dispose of a moiety in case he left a widow, and only of a third in case he left both widow and children; and the statute recites, “ that the widow and children were entitled
“ to their shares by the custom;” so that the law considered them as having a charge upon the personal estate, which could not be affected by the husband or father. In the case of *Read v. Duck**, a loss happening by the insolvency of an executor of a freeman of *London*, before the statute which gave such freemen power over their whole personal estate, Lord *Cowper* determined, that the loss should be borne by the testamentary part only; the widow and children being in the nature of creditors on the other parts. But since the above statute, if an inhabitant of the province of *York*, or a freeman of *London*, makes a will, naming an executor, and such executor should embezzle the effects, or prove insolvent, if there be assets of the testator to be found, the creditors or legatees will not suffer, because the whole personal estate would be assets, and liable to answer the purposes of the will, he being testate as to the whole; whereas before the statute

* Preced. in
Chan. 409.

statute the dead man's share alone was so liable, which clearly points out the difference introduced by the statute: For where a man makes an executor, the whole personal estate vests in him; and as there is nothing left for the custom to operate upon, the whole becomes testamentary. Now in the present case, the testator having made an executrix, had died testate as to the whole, so that the whole thereby became the testamentary, or dead man's share, since by the statute he had a right to bequeath the whole; nothing therefore being left for the custom to operate upon, and there being, in equity, a resulting trust of the surplus, the Court had properly decreed a distribution of it, according to the general law of the land, the custom being excluded; namely, to those to whom, antecedent to the statute, the dead man's share would have gone. Though the case of *Beard v. Beard* *, was cited on the part of the appellant, with intent to shew that there is no difference between a total and a partial intestacy, yet in fact that case confirms the doctrine; for there the Court held the will to be revoked as to all the personal estate, and decreed distribution, as if no will or deed had been made. The general law of the land must therefore take place upon the resulting trust, for if the widow was now to set up the custom, she would claim against the statute, *in other manner than the will has appointed*, which had devised away the whole, and taken it out of the custom; a Court of Equity will not therefore restore the operation of the custom against the statute.

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* 3 Atk. 72.

But after hearing Counsel on this appeal, it was DECLARED, that the appellant was entitled to the residue of the personal estate to her own use: And therefore it was ORDERED and ADJUDGED, that both the decrees should be reversed; and that the cause should be remitted back to the Court of Chancery, to set aside the order of the 18th of *December* 1771, and to make such further order as should be just *.

DECREES
reversed.
M. S. Jour.
sub anno 1777.
p. 676.

* Accordingly, on the 7th of *July* 1777, the Court made an order, discharging the former order of the 18th of *December* 1771, and directing the monies which had been paid by the appellant in pursuance thereof, to be paid back again; after deducting thereout the costs of the suit.

Register
1777. Lib. B.
p. 412.

Case 42. Between *Pinckney Wilkinson*, Esq; Appellant.
Bryan Allott, Clerk, - - Respondent.

13th May, 1777.

THE respondent was, on the 29th of *January* 1766, instituted, and on the 4th of *March* following, duly inducted into the rectory and parish church of the consolidated parishes of *Burnham St. Mary*, otherwise *Burnham Westgate*, and *Ulpb*, in the county of *Norfolk*, and thereby became entitled to all the glebe lands belonging to the said rectory and consolidated parishes.

These glebe lands principally consist of a great number of small pieces, lying dispersedly in and over the open and common fields, containing in the whole upwards of 100 acres, which pieces of land or most of them had certain marks, metes and boundary marks to ascertain the same, and the length, breadth and extent thereof.

Ever since, and for some years before the respondent's induction, the appellant had been the owner and proprietor of a considerable estate lying within these consolidated parishes, or one of them, of the yearly value of 1000 *l.* or thereabouts; and particularly, of a great number of pieces or parcels of land, lying dispersedly in and over the open and common fields, intermixed with, or adjoining to which, the greater part of the glebe lands lie; part of which estate the appellant let out to tenants, and other part thereof he kept in his own occupation and manurance.

The appellant taking advantage of the negligence and inattention of the respondent's predecessors, rectors of the said parishes, and having considerable influence over them, by reason of his being possessed of a large estate, got into his hands, and let to several of his tenants, together with other lands of his own, and also kept in his own occupation and manurance, a great number of the pieces of glebe land, which lay near to or intermixed

mixed with his own lands, and ploughed up, defaced or otherwise destroyed, the several mier balks and dool stones, which served as metes and marks by which the same were formerly ascertained and bounded; by reason of which, and of the several lands next adjoining thereto having passed through a variety of hands, and having been the property of different persons at different times, since any terrier was made or taken of the glebe lands belonging to the said rectory, the respondent being newly come into the rectory, and ignorant of the particular pieces of glebe lands which belonged to the same, was unable to discover or distinguish such glebe lands, or to bring any ejectment for them, or recover possession thereof at law; and the appellant never having paid the respondent any rent, or made any other satisfaction for the use and enjoyment of the said glebe lands, nor for the *Easter* offerings, and other ecclesiastical dues belonging to the respondent, as rector of the said parishes: The respondent on the 1st of *February* 1771, filed his bill in the Court of Exchequer, setting forth the several matters before mentioned, and praying, that the appellant might be decreed to pay to the respondent, a reasonable rent or satisfaction for the several glebe lands belonging to the rectory of the said consolidated parishes, held, enjoyed or let by the appellant, from the time the respondent became entitled to such glebe lands, and that he might be decreed to deliver up the possession thereof, and the several terriers, maps, plans and field-books thereof to the respondent; and also to restore, set up or make a-new the several proper metes, boundary and other marks of the same, which had been ploughed up, defaced, taken down, or destroyed by the appellant, or by his order and directions; and for an account of the small tithes, *Easter* offerings, and other ecclesiastical dues; and for such other relief as to the Court should seem meet.

To this bill the appellant put in his answer, and thereby admitted the respondent's induction to the said rectory and parishes, and that he thereby became entitled to all the glebe lands belonging to the said rectory, and the great and small tithes, *Easter* offerings, &c. but denied, that he or any of his tenants were in the possession of any of such glebe lands. The appellant admitted to have in his custody, a map or plan of the said consolidated parishes, which appeared, from the date thereof,

to

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to have been made in the year 1648, and was entitled, "An
 " exact description of the parishes of *Burnham Westgate* and
 " *Burnham Norton*, in the county of *Norfolk*, setting forth their
 " joint and several lines of perambulation, with all the parcels
 " of land as they are now divided within the said parish of *Burn-*
 " *ham Westgate*, and part of the parcels of land lying within the
 " said parish of *Burnham Norton*, and also some parcels of land ly-
 " ing in the adjoining parishes, measured, surveyed and delineated,
 " at the appointment of *Thomas Soame*, Esq; lord of the lord-
 " ships and manor of *Raynham* alias *Lexhams*, alias *Burnham Lex-*
 " *hams* and *Polstead Hall*, lying within the said parishes, per Jo-
 " *bannem Kersey, Philomathemat.*" And that it appeared by this
 map, that there were several parcels of glebe land belonging to the
 rectory, lying dispersedly in small pieces in the several fields with-
 in the said parishes, which pieces of land were particularly distin-
 guished from the adjoining lands, by certain marks or letters
 which ascertained them to be glebe.

The respondent took exceptions to this answer, and the ap-
 pellant put in a further answer, setting forth an account of the
 several farms and lands occupied by him since the time of the
 respondent's induction into the rectory; but he denied, that
 any of the metes or boundary marks belonging to the glebe lands
 had ever been ploughed up, defaced or destroyed by him, or any
 of his ancestors.

Issue being joined, several witnesses were examined on both
 sides; and on the part of the respondent it was proved, that during
 the incumbency of former rectors, there were various pieces
 of glebe, lying interspersedly in the open and common fields of
 the said parishes, some parcels of which, the rectors at times
 kept in their own hands, and let other parcels off to the appel-
 lant's tenants; that formerly there were mier balks and other
 marks, by which the said glebe lands were bounded, and could
 be distinguished; that these mier balks were since ploughed up
 and destroyed, and some of them by the appellant's express order
 and directions; that he and his tenants were now in possession of
 many pieces of the same glebe land, which had been in the oc-
 cupation of, or let off by former rectors; and that the whole of
 the said glebe land in the possession of the appellant, or his te-
 nants, amounted to about 90 acres.

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On the 22d of *May* 1775, the cause was heard, when it was ordered, that it should be referred to a trial at law, in a feigned action to be for that purpose brought, upon the following issue; viz. "Whether the appellant, or his tenants, was in possession of 90 acres of glebe lands, belonging to the respondent, as rector of the consolidated parishes of *Burnham St. Mary*, otherwise *Burnham Westgate* and *Ulpb*, in the county of *Norfolk*?" And if the jury should find, that any more or less than 90 acres of glebe land was in the possession of the appellant, or his tenants, the same was to be indorsed on the *postea*; and that the said issue should be tried at the then next lent assizes for the county of *Norfolk*, by a special jury of the said county, and that a view of the premises should be had on the 5th of *March* then next, by six of the jurors first named on the panel, to be returned to the sheriff of the county of *Norfolk* for the trial of the said issue, or by such of them, or by as many more of them as should attend for that purpose; and the court directed an account to be taken of the small tithes, *Easter* offerings, and other ecclesiastical dues, and ordered the appellant to pay the respondent, his costs of the suit to that time; and reserved the consideration of subsequent costs, and further directions, until after the trial.

The issue was tried at the summer assizes 1776, by a full special jury, six of which jurors had attended upon the view; when a great number of witnesses were examined, and proved, that the respondent was at the time before mentioned, duly inducted into the rectory of the consolidated parishes of *Burnham St. Mary*, otherwise *Burnham Westgate* and *Ulpb*, together with *Burnham Norton*, in the said county of *Norfolk*, which said parish of *Burnham Norton*, was consolidated with, and had constantly passed by the same institution with the two former parishes for a long time past, as was proved by a book of the Right Rev. the Bishop of *Norwich*, in whose diocese the said consolidated parishes lie. The before mentioned map or plan was at the trial produced to the jury, from the custody of the appellant, by which it appeared, that there were at that time several parcels of glebe land lying interspersedly within the said consolidated parishes, which were particularly marked and bounded, and by being compared with and measured by the scale of the map, by a skilful land surveyor, were found to amount in the whole, to 90 acres or thereabouts. The respondent likewise produced a terrier of the glebe lands be-

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longing to the said rectory, exhibited at the ordinary visitation of the Lord Bishop of the diocese, in the year 1706, and proved by the Bishop's register, who attended for that purpose, which terrier was not only signed by the then rector and churchwardens, but likewise by some of the principal inhabitants of the said consolidated parishes; by which it appeared, that there were at that time, various pieces of glebe, lying in different parts of the fields of the said parishes, amounting to very nearly the same quantity in the whole, as was ascertained by the measurement of the map. And it being proved by the testimony of several witnesses, that many pieces of the said glebe lands were in the possession of the appellant or his tenants, and that he caused many of the mier balks and boundaries to be plowed up and destroyed, and no contradictory evidence being offered on the appellant's part; the jury found, that the appellant was, by himself and his tenants, in the possession of 84 acres of glebe land, belonging to the respondent, as rector of the said consolidated rectory, and gave a verdict for the same accordingly.

The appellant, on the 15th of *November* 1776, obtained an order for the respondent to shew cause on that day se'nnight, why a new trial of the issues directed by the decree should not be granted; which order was enlarged to the 4th of *February* 1777, when the respondent having shewed cause against a new trial, the Court allowed of the cause so shewn, and ordered that no new trial should be granted.

E. Thurlow.
A. Wedderburn.
R. Jackson.
H. Joddrell.

From this order the present appeal was brought, and on behalf of the appellant it was contended, that the maxim of *nullum tempus occurrit Ecclesiæ*, by which the respondent could alone avail himself, applied no farther, than that no statute of limitations can be actually pleaded in bar to the rights of the church; but the maxim diminishes not the right of the party, adverse to the claims of the church, which is deduced from the length and operations of time; and as the appellant, and those from whom he claimed, had immemorial and uninterrupted seisin of most part of the lands comprised in the verdict, till the year 1772, when the respondent forcibly took possession of twenty nine acres, which the appellant had since recovered upon an ejectment; a Court of Justice would so far protect a title purchased for a valuable consideration, as not to have it totally defeated by one trial at law,
and

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and by a claim founded in presumptive, not positive proof. The verdict was erroneous, because it comprehended lands belonging to the parish of *Burnham Norton*; and the issue was confined to the consolidated parishes of *Burnham Westgate* and *Ulpb.* The admitting maps as competent evidence, in all cases where they should be found in the possession of the person against whom they were produced, unaccompanied by any evidence of the occasions or purposes for which they were made, could not but be highly dangerous to the property of every landholder in the kingdom; but much more so, when such maps should appear to have been, for a considerable space of time, in the hands of a person claiming under an adverse title. In the present case, notwithstanding several objections were made, both to the competence and credit of the map made in 1648, the judge was pleased to give no weight to any of them, but to pass them all over; because, as he informed the jury, "all maps, as well as other written evidence, had been ordered by the Court of Exchequer, "which was a Court of Equity, to be produced at the time of "the trial." Whereas, it is a well known rule of law, that such order is never construed, or understood to extend to give either competence or credit to any map or instrument, which would not have been entitled to competence or credit, without such order, as evidence to be admitted in a Court of Law; and it was remarkable, that in this case, the witnesses examined at the time of the trial, the map, and the terriers, contradicted one another.

But supposing the map to be free from all objection, and even to have been conclusive evidence, yet the contents of it did not warrant the verdict; for as the measures of the several pieces of land were not marked upon them, this circumstance not only rendered the map more liable to be altered by the interposition of a line or letter, but made it necessary to supply the quantity from other evidence. It had accordingly been attempted to effect this by the testimony of *John Willock*, a surveyor, who swore that he measured the several pieces marked *M. N.* and *O.* by a scale on the map; but there was a palpable absurdity in *Willock's* evidence, which deprived it of all credit: For he swore, that the *abuttalled* lands measured 64 acres and 34 poles, and the *unbuttalled* lands, 20 acres and 26 poles; which last, if any such there were, it is obvious he could not possibly measure

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measure with a scale. It appeared, that the surveyor measured all the lands marked *M. N.* and *O.* and that the associate took down the particulars and amount of all those pieces; the Judge referred the jury to what the associate had taken down; and the verdict of the jury was manifestly directed by the associate's account. Yet the letter *N.* appeared by the map, to denote lands belonging to the rectory of *Burnham Norton*, to which the issue did not extend. The defect in the proof of the quantity, was not cured by the terrier of 1706, where the quantities were expressed not in words, but in figures only; because that terrier was not signed by the owner or occupier of the lands belonging to the appellant, and was contradicted by two subsequent terriers, signed by the respondent's predecessor. And if a new trial should be granted, the respondent might still have an opportunity of making out the quantity of the glebe land which he was entitled to; but if such trial should be refused, the appellant and his heirs would be bound by the last verdict, and could never have any redress.

But further: The appellant submitted the following objections to the competency and credit of the map, on which the respondent's right to the glebe lands in question was founded. I. This map having been delivered to the respondent's predecessor, and in his possession, it was totally deprived of its original validity, as applied to the rights of the appellant; and especially when erasures and alterations evidently appeared to have been made upon it in many places, and in particular upon the pieces which related to the glebe. II. No acquiescence in the descriptions of this map, had ever been shewn by any person whose property it was said to describe, to denote the accuracy, or prove the authenticity of it; nor was it signed by any of the persons whose rights were affected by it; though it was made to describe whole parishes, and the possessions of different proprietors. III. The specific quantity of each piece was not marked, nor was there any account of what quantity of land in general was belonging to each proprietor, but from the letters of reference, which are liable to interpolation; as was the quantity of each piece to augmentation by erasures, or diminution by the inserting a line. The quantities contained in each piece, by admeasurement from a scale, must be extremely uncertain, and must depend upon an accuracy in the delineation, which scarcely any

any map would admit of; and least of all a map, which notwithstanding the declaration of the surveyor, had on the face of it the most palpable marks of negligence and inaccuracy. There were several pieces described in the map, to which even at this time no letter was affixed; and there was one piece, on which two different letters were affixed, referring to different parishes. IV. The map was in the possession of the respondent's agents, for a considerable time; copies were clandestinely taken of it, without any application to the Court of Exchequer, and the pretended survey was made in the same clandestine manner, without the knowledge of the appellant.

1777.

On the other side it was said, that the objection to the map appeared the rather extraordinary, as it was made under the direction of the Lord of the Manor for the time being, and was produced by the appellant, the present Lord of the Manor; and therefore seemed to be evidence perfectly unexceptionable as against him. The terrier was authenticated by the signature of the rector, the parish officers, and other considerable inhabitants of the parish, and was produced from the Bishop's registry, the proper repository for such instruments. In questions of this sort, terriers are always received in evidence; and in this instance, the terrier and map derived, by their coincidence, additional credit from each other. The parishes, though originally three, had long been consolidated, and therefore more properly one parish, which was familiarly known in the county by the name of *Burnham*; the respondent held them all by one and the same title, and the question in the Court of Exchequer was, whether that title supported his claim to the lands in question; so that *Norton* was substantially, though not literally, within the terms of the issue. But it was objected, that it did not appear upon the evidence, that the respondent had any seisin of the glebe in question. If the objection meant that the respondent personally had not possession, it was the very grievance he complained of; but if it appeared from the evidence, as it satisfactorily did, that his predecessors were in possession in 1706, the date of the terrier, or even in 1648, the date of the map, though that possession had been since injuriously taken and withheld from him; it was apprehended, there was sufficient evidence of seisin, so far as seisin was necessary for such a claim; in fact, the respondent was still

J. Dunning.
H. Partridge.

1778. in possession of so much of his glebe, as his neighbours had thought fit to leave him.

Order
affirmed M.S.
Jour. sub.
anno, 1778,
p. 810.

After hearing counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed, and the order therein complained of, affirmed: And it was further ORDERED, that the appellant should pay the respondent 100 l. for his costs in respect of the said appeal.

Case 43. *Thomas Pilkington*, Gent. - - Appellant.
Frances Bayley, Widow, - - Respondent.

26th January, 1778.

THE Rev. *Matthew Pilkington*, prebendary of the prebend of *Ryton*, in the county of *Warwick*, founded in the cathedral church of *Litchfield*, was, in right of the said prebendary, seised of the prebend rectory and other particulars, &c. and being so seised, and in actual possession thereof, he by indenture of lease, dated the 18th of *August* 1762, made between the said *Matthew Pilkington* of the one part, and the Rev. *Thomas White* of the other part, for the considerations therein mentioned, demised to the said *Thomas White*, all that his prebend rectory, parish, or parsonage of *Ryton* aforesaid, with the rights, members and appurtenances thereof; and also all that his mansion house, with the buildings thereto belonging, and all manner of glebe lands, woods, underwoods, commons, wastes, fields, leafows, meadows, pastures, fishings, fruits, and all manner of tithes, predial or personal, pensions, oblations, obventions, portions, hereditaments, and advantages whatsoever, to the said prebend or rectory belonging (the nomination of a curate to officiate in the said church of *Ryton* only excepted;) to hold (except as before excepted) to the said *Thomas White*, his executors, administrators and assigns, from the day next before the day of the date thereof, for the term of 21 years, from thence next ensuing; yielding therefore yearly, during the said term, unto the said *Matthew Pilkington* and his successors, prebendaries of the said prebend of *Ryton*, in the said church

of *Litchfield*, upon the font stone there, the rent of 15 *l.* quarterly: And also making several other annual payments, in the said lease particularly mentioned.

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This lease was made to *White*, in trust for the said *Matthew Pilkington*; and accordingly, Mr. *White* signed the following declaration of trust to him. “ 18th August 1762. I *Thomas White*, “ clerk, do hereby acknowledge, that the lease of the prebend of “ *Ruiton*, otherwise *Ryton*, bearing date this day, is made and “ granted to me in trust, for the Rev. *Matthew Pilkington* and “ his family; and I hereby promise to assign the same, as the “ said *Matthew Pilkington*, or his executors or administrators, “ shall direct and appoint.”

The said *Matthew Pilkington* married the respondent Mrs. *Bayley*, the daughter and only child of Mrs. *Frances Clerke*; and Mrs. *Clerke*, after her daughter's marriage, lived for many years at Mr. *Pilkington*'s house, as a companion to her daughter; and continued so to do as long as Mr. *Pilkington* lived.

During this period Mr. *Pilkington*, finding his health declining, came to a resolution of making a lease of his prebend to Mrs. *Clerke*, his wife's mother, for her own benefit; and accordingly, by indenture dated the 23d of June 1764, in consideration that Mrs. *Clerke* had procured to be surrendered into his hands, the aforesaid lease made to *Thomas White*, and also in consideration of the rents, covenants and agreements therein after expressed and reserved, he demised to Mrs. *Clerke*, her executors, administrators and assigns, all the aforesaid premises, for the term of 21 years; subject to the like rents and sums of money, and to the like covenants and agreements as were mentioned in such surrendered lease.

This lease was drawn from instructions given by Mr. *Pilkington*; and about the time it was made, an inclosure of the prebendal estate was in contemplation, and likely to take effect; which made it proper that *John Kelham*, the tenant occupying the premises, should come to a new agreement for his holding; and accordingly, in the summer of 1764, soon after the execution of this lease, Mr. *Pilkington* called upon *Kelham* in his return from London, and told him that he had granted a lease of the prebendal

1778.

bendal estate to Mrs. *Clerke*, and that *Kelham* must agree with Mr. *Clement Wilson*, who was authorized by Mrs. *Clerke* to treat with him, for granting him a lease; for that he, Mr. *Pilkington*, had parted with the estate, and had nothing more to do with it. *Kelham* accordingly, treated and agreed with *Wilson* for a lease; and Mrs. *Clerke* granted a lease of the estate, dated the 10th of July 1764, to *William Kelham* and *John Kelham* his son, for 21 years, from the 9th of that month, at the yearly rent of 110*l.* for the first four years, and 214*l.* for the remainder of the term, clear of all deductions, except the payment of the land tax, and the several yearly rents and sums of money reserved by the said lease from Mr. *Pilkington* to Mrs. *Clerke*. Mr. *Pilkington* was a subscribing witness to Mrs. *Clerke*'s execution of this lease, and the lease from him to Mrs. *Clerke* was therein recited; and from the time of granting the lease to the death of Mr. *Pilkington*, and afterwards, *Kelham* paid his rent to Mrs. *Clerke*, and continued so to pay it to the time of her death.

Mr. *Pilkington* was seised of several freehold and copyhold lands and premises at *Donnington*, in *Lincolnshire*, which let together at 124*l.* a year, subject only to a mortgage for 1100*l.* and were worth at least 4000*l.* to be sold; and after his decease, they were greatly improved by an inclosure. He had no near relation, his nearest being a first cousin, and the appellant was only his second cousin.

On the 17th of December 1764, Mr. *Pilkington* made his will; whereby he directed, that all his just debts (except the principal money secured by mortgage on some part of his estate) funeral expences, and the expences of proving his will, should be first paid and satisfied, out of such part of his personal estate as was not therein after specially bequeathed; and he devised and bequeathed to his affectionate wife *Frances Pilkington*, and her assigns, for her life, all his freehold, copyhold and leasehold messuages, lands, tenements, hereditaments, and estates in the counties of *Lincoln*, *Warwick*, *Derby*, and *Nottingham*, or elsewhere in the kingdom of *Great Britain*; and from and immediately after her decease, he devised and bequeathed all the said estates and premises to the appellant, his heirs, executors, administrators, and assigns for ever; subject nevertheless, and he thereby charged the same with the several legacies therein after mentioned, and then proceeded to give several money legacies to several persons; and gave all the rest and residue of

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of his goods, chattels, ready money, debts and securities for money, plate, household goods, stock and all other his personal estate whatsoever and wheresoever, and of what nature, kind or quality soever the same might be, and not otherwise thereby given or disposed of, after payment of his debts (except the principal money charged upon the aforesaid estate, funeral expences, and a legacy of 10*l.* payable to the poor of *Stanton*) unto his said wife *Frances Pilkington*, her executors, administrators and assigns, to and for her and their use and disposal absolutely, and appointed his said wife, *Frances Pilkington*, sole executrix of his said will.

The testator at the time of making this will, had no estate in either of the counties of *Derby* or *Nottingham*; but his estate in *Lincolnshire* was much more than sufficient to pay off the mortgage, and the legacies charged thereon by his will.

The testator died in *November* 1765, without revoking or altering his will; and his widow, the present respondent, proved the same.

In 1766, Mrs. *Pilkington* married the reverend Mr. *John Bayley*, and soon afterwards Mr. *Bayley* paid the 1100*l.* mortgage on Mrs. *Pilkington*'s real estate, and it was assigned to *Thomas Blackwall*, in trust for Mrs. *Bayley*.

In 1768, *Bayley* died, having made his will on the 23d of *October* 1767, wherein he bequeathed the residue of his personal estate to his wife, and appointed her executrix thereof, and she proved the same.

Dr. *Du Quesne*, who succeeded Mr. *Pilkington* in the prebend, agreed to renew the aforesaid lease of the prebendal estate, for a fine of 215*l.* and accordingly, the old lease was surrendered by Mrs. *Clerke*, and on the 21st of *December* 1770, a new lease was executed to her for 21 years, subject to the like payments, covenants and agreements, as in the surrendered lease. Mrs. *Clerke* paid the 215*l.* fine, and Dr. *Du Quesne* gave her a receipt for the money, but she being very old and infirm, this business was negotiated by Mrs. *Bayley* for her.

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On the 14th of *December* 1772, the appellant filed his bill in the Court of Chancery, against the respondent, and her mother *Mrs. Clerke*, suggesting, that the lease of the prebendal estate was made in trust for *Mr. Pilkington*, and intended by him to pass to the appellant by his will, which was made within less than six months after.

The defendants *Mrs. Clerke* and *Mrs. Bayley*, put in separate answers, and *Mrs. Bayley*, by her answer, disclaimed any right to the prebendal estate, for that *Mr. Pilkington* had given the same to her mother *Mrs. Clerke*; and that such lease was not granted in trust for *Mr. Pilkington*, or on any trust, but for *Mrs. Clerke's* own use and benefit; and denied all fraud and contrivance to wrong the appellant; and also denied and disclaimed all trust for herself in the renewed lease.

The defendant *Mrs. Clerke*, in her answer said, that the lease was given and granted to her by *Mr. Pilkington*, and that the premises were let to tenants by her, and in her name, and denied that *Mrs. Bayley* ever had any benefit, under *Mr. Pilkington's* will, in this estate; or that she *Mrs. Clerke* ever signed or executed any declaration of trust to *Mr. Pilkington* of this estate, neither did he ever desire her so to do, but positively told her, that the same was her own property, and that she might do what she pleased therewith; and that she always understood that the said leasehold premises were her own absolutely, and that she always claimed an absolute interest therein, by virtue of the lease granted to her as aforesaid.

On the 12th of *December* 1774, *Mrs. Clerke* died, having first made her will; by which she appointed her daughter, the respondent, executrix and residuary legatee.

The suit being afterwards revived against *Mrs. Bayley*, several witnesses were examined on both sides; and the cause came on to be heard before the Lord Chancellor *Bathurst*, on the 3d of *May* 1776, when his Lordship was pleased to order, that the appellant's bill should be dismissed, but without costs.

A. Wedderburn.

J. Dunning,
Ll. Kenyon.

The appellant therefore appealed from this decree, contending, that so long as the legal interest in the lease was vested in Mr.

1778.

Mr. *White*, it was clearly in trust for Mr. *Pilkington*, the testator; and it appeared from the evidence, that the only avowed reason for substituting the name of Mrs. *Clerke* in the place of Mr. *White*, was, because she lived in Mr. *Pilkington*'s family, and therefore would be a more convenient trustee. The age of the two parties rendered it improbable, that Mr. *Pilkington* should give so large a part of his property from himself and his family, to a person who might in his lifetime, dispose of it to strangers. The unreasonableness of the disposition contended for by the respondent, could not be disputed; but it is said, that the statute of frauds requires, that all declarations of trusts of any lands, must be in writing, or else they are void. But the proviso in the act, following that clause, excepts all trusts arising or resulting by implication, or construction of law; and declares, that such trusts shall have the same force as if the act had not been made. Now it was conceived, that this was a case of that kind. No money was paid by Mrs. *Clerke*; the surrender of the former lease was not procured by her; nor did she give any directions respecting the lease made to her; on the contrary, all was done by Mr. *Pilkington*'s direction, and he paid the expences of preparing the lease and counterpart. If there had been a fine paid for the renewal, and it had been paid by Mr. *Pilkington*, the case would have been clearly in the appellant's favour; the largeness or smallness of the fine could have made no difference in the question of right: And though no fine was paid, yet it was conceived, that Mr. *Pilkington*'s bearing the expences of renewing the lease, was equivalent to the payment of a fine, and raised a resulting trust for his benefit. The delivery of the lease and counterpart to Mr. *Pilkington* after the execution, the management of the estate by him after the lease was made, his receiving the rents, and rendering no account to Mrs. *Clerke* for them, were all circumstances to shew, that the trust for Mr. *Pilkington* was in fact carried into execution. And though she endeavoured by her answer to insinuate, that the rents were accounted for by Mr. *Pilkington* to her, yet she dared not positively to say so. The whole case appeared to be a very gross fraud; and if it be a rule, that the statute of frauds shall not be made use of to protect frauds, it was conceived that rule applied here: And therefore it was hoped, that the decree would be reversed.

On the other side it was said, that the only question in the cause was, whether the benefit of the lease made by Mr. *Pilking-*

E. Thurlow.
J. Madocks.
T. Emlyn.

ton

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ton to Mrs. Clerke, on the 23d of June 1764, was a resulting trust for himself by operation of law, or not; there being no declaration of trust in writing by the lessee, or any trust expressed upon the lease itself. All trusts by operation of law, are to be created by rules established in courts having the jurisdiction of trusts. These rules have gone no farther, than to cases of purchases made by one man in the name of another; where the implication of a trust is necessary, if the nominee is a stranger to the purchaser. But no case has extended an implied trust, as between lessor and lessee, nor is it possible that any implied trust can subsist between parties in that relation, because every lessee is a purchaser by his contract and his covenants, which excludes all possibility of implying a trust for the lessor; and therefore if in that case, there be any trust at all, it must be declared in writing. This distinction was observed in the present case; for Mr. Pilkington intending White to be a trustee in the first lease, took from him a declaration of trust in writing, but upon the second lease made to Mrs. Clerke, he did not take, or require any writing; which afforded the strongest inference, that he did not intend there should be any trust. The statute of frauds has shut out all evidence of an express trust, but written proof of it. But if equity is to create an implied trust, from circumstances concurring with the rules of equity, it lets in the defendant to evidence to rebut the equity, either by controverting the truth of the circumstances offered by the plaintiff, or by opposing other circumstances to them, to take off their effect. And accordingly in this case, notwithstanding the plaintiff had failed in the proof of any circumstances in favour of a trust, the defendant had given strong evidence of circumstances inconsistent with a trust, and in support of her answer, by which the supposed trust was fully and absolutely denied.

DECREE
affirmed.
M. S. Jour.
sub anno 1777.
p. 112.

After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the decree therein complained of, affirmed.

The Honourable *Henry Lawes Luttrell*, Appellant. Case 44.

The Right Honourable *Simon*, Lord } Respondent.
Irnham, - - - - - }

4th May, 1778.

THE respondent Lord *Irnham*, being seised, as tenant for life without impeachment of waste, of the mansion house, offices, demesne, park and paddock of *Luttrells Town*, in the county of *Dublin*, which is the respondent's only family seat in *Ireland*, made an agreement with the appellant his eldest son, to let him a lease thereof for the term of seven years, if they should both live so long, at a rent of 400 *l.* a year; and accordingly, on the 24th of *May* 1769, the respondent, by indenture of lease then dated, in consideration of the rents and covenants therein expressed, demised to the appellant, the said house, offices, demesne, park and paddock of *Luttrells Town*, with the appurtenances, to hold for the term of seven years, from the first of *May* then instant, provided the respondent and appellant should so long live, at the annual rent of 400 *l. Irish* currency, and payable half yearly, with the usual and common covenants: And there being great quantities of useful, ornamental and growing timber on the park and lands, it was also covenanted and agreed, that neither of the parties should cut down any trees whatsoever upon the demised premises, without the consent of the other party. Which lease, the respondent executed upon the same day of its date, in the presence of *Matthew Duane*, Esq; who prepared the same, and of *Thomas Morgan*, stationer; and in a few days afterwards, the appellant executed the counterpart, (which was not finished when the lease was executed) in the presence of the said *Matthew Duane* and *Thomas Morgan*, who were the subscribing witnesses; and soon afterwards, the appellant entered upon and took possession of the demised premises.

In the year 1771, the respondent discovered, that the appellant had cut down and disposed of a great quantity of timber in the woods upon the demesne, to the value of 4000 *l.* and upwards; and had also pulled down part of the mansion house:

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And the appellant appearing determined to strip the estate, which could not be prevented without the interposition of a Court of Equity; the respondent therefore, on the 28th of *June* 1771, filed his bill in the Court of Chancery in *Ireland* against the appellant, in order to restrain him from committing waste upon the premises, and obtained an injunction for that purpose: To which bill the appellant put in his answer, on the 6th of *November* 1772, and thereby denied, that he believed he had ever executed a counterpart of the lease. Whereupon the respondent replied to the answer; and issue being joined, he examined Mr. *Duane*, to prove the execution of the lease, who not only proved the execution thereof by the respondent, and the counterpart by the appellant; but also proved the original agreement to have been for five years; and that when the lease came to be prepared, they agreed to extend it to seven years; and that the respondent executed the lease upon a promise of the appellant, that he would call at Mr. *Duane's* to execute the counterpart when it should be ready, which he accordingly did; and that it was read over to him before he executed the same. The appellant did not think proper to cross examine Mr. *Duane* to any particulars; and his deposition was duly published in the cause.

The appellant's lease was to expire on the 1st of *May* 1776; and the appellant apprehending, that the respondent would require the possession of the mansion house and premises to be restored to him at the expiration of the lease, which the appellant was unwilling to part with; he therefore contrived a bill in Chancery against the respondent, in order to involve him in an account; and under pretence of a balance due to him, to find a colourable ground for retaining the possession, and preventing the respondent from recovering the same by due course of law. Accordingly, on the 20th of *April* 1776, the appellant filed a voluminous bill in Chancery against the respondent, to which he annexed a pretended account of money dealings between them; and alledged a different agreement for the lease from that contained in it, and prayed an injunction to restrain the respondent from proceeding at law, to recover the possession of the premises in the lease.

The term of the lease expired on the 1st of *May* 1776; and the respondent, upon the 2d of that month, sent persons authorized

rized for that purpose, to demand and receive the possession of the demised premises on his behalf: But the possession was, by the order of the appellant, refused by his servants, and particularly by his bailiff or steward, *Francis MacFarland*; and by the appellant's order, the gates were also locked up, and all access denied to the persons empowered and sent by the respondent to receive such possession, with declarations of resistance if any force should be used; whereby the possession of the premises was forcibly withheld and detained from the respondent, on the behalf, and under the direction of the appellant.

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Upon this unjust detainer of the possession, the respondent, on the 3d of *May* 1776, exhibited his possessory bill in the Court of Chancery against the appellant and *MacFarland*, stating the right and possession of the respondent for 40 years and upwards; the lease, and the appellant's enjoyment under it; and that the rent had been paid, allowed or accounted for to the respondent; the expiration of the term, and the respondent's right to the possession; the demand of possession, and the forcible and unlawful detainer thereof; and praying the relief usual in such cases, namely, to be restored to, and quieted in the possession of the premises; and for an injunction to that effect, to be directed to the defendants in that cause; and in default of their obeying the same, praying an injunction to the sheriff of the county of *Dublin*, commanding him to restore the respondent unto, and to quiet him in such possession, until thereout evicted by due course of law. And the truth of this bill being verified by the usual affidavits, upon application to the Court, on the 4th of *May* 1776, it was ordered, that an injunction to be directed to the defendants, should issue to give and restore to the respondent, or his assigns, the actual quiet and peaceable possession of the premises; the same to continue until the respondent should be thereout evicted by due course of law, or the further order of the Court.

The appellant and *MacFarland* having been served with this injunction, and not choosing to yield obedience to it, they appeared in consequence of such process, as upon a contempt for disobeying the injunction, and according to the practice in such cases, required personal interrogatories to be exhibited unto them; and the same were accordingly filed upon the 17th of *May* 1776, but

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but the defendants, although resident within five miles of the city of *Dublin*, did not answer these interrogatories until the 18th of *July* following, when they put in their answer: And the appellant thereby admitted, that the respondent was, from the death of his eldest brother, seised in fee of the whole family estate, till the execution of his marriage settlement in *January* 1735, and that from the date of that settlement, to 1769, he was seised in fee of the mansion house and park of *Luttrells Town*; and from the date of a settlement of the 22d and 23d of *May* 1769, he had been tenant for life of the mansion house, park and paddock, and of the other estates comprised in that settlement. He said, that before the year 1769, the respondent had agreed to give him an annuity of 400 *l.* which in 1769 he agreed to increase to 600 *l.* upon a new arrangement of their family affairs; and he said it had been agreed, respecting the lease, that it should be during the joint lives of himself and the respondent, or for seven years, at his option; and that he was to be at liberty to cut down trees, and out of the value of them to repair. That the agreement was reduced into writing, and left with the respondent, in order that he might have a lease prepared by Mr. *Duane*, the respondent's law agent: That he had no recollection of the execution of the lease or counter part; but that if he did execute the counterpart, he executed it in the hurry of the *Middlesex* election, and by mistake and surprize, the same day that several other family deeds were executed, supposing it to be a counterpart of some other family deed. That on the 19th of *April* 1776, the appellant filed his bill in the Court of Chancery of *Ireland*, for a discovery of the agreement, and for a performance thereof, and for an injunction to restrain the respondent from recovering the possession at law. And the appellant further stated in his answer to the said interrogatories, a certain annuity deed, bearing date the 24th of *May* 1769; whereby the respondent had granted to the appellant, one annuity of 600 *l.* *English* money, making above 650 *l.* *Irish* currency, payable at the *Royal Exchange* of *London*, by quarterly payments, during the joint lives of the appellant and respondent; and charged upon all the respondent's estates in the counties of *Dublin*, *Meath* and *Kildare*, and in the city of *Dublin*, and which are of the yearly value of 2500 *l.* and upwards; and by such deed a power of distress was given, if such annuity should be in arrear by 21 days; and if the same should be unpaid by the space of 40 days, it should

should be lawful for the appellant to enter, &c. And he further alledged, that a considerable arrear of that annuity was due to him at *Christmas* 1776, and for forty days next following; and that from the end of those forty days, he, without any legal or notorious proceeding, or act, was to be considered as possessing and holding the said lands, as part of the *Dublin* estate, subject to such annuity, under his said clause of entry, and not under the said lease. And the appellant further alledged by this answer, that the rent reserved by the agreement for a lease, and by the respondent alledged to have been reserved by the lease, was during all the term, by being credited to the respondent out of the rent charge, allowed to the respondent, or to his use: And he admitted, that possession of the premises was demanded on behalf of the respondent by his agents, and that that possession was demanded from the keepers of the gates, and that the same was refused, by the outside gates and doors of the premises being shut against them, and by their being denied admittance; and that the respondent's agents were so opposed, with the knowledge, and under the authority of the appellant; and that the park gate was locked to prevent the entry of the said agents; and that he the appellant had ordered them to be locked, because the respondent had declared his resolution to turn the appellant out of possession, after the 1st of *May* 1776.

It being the practice of the Court upon possessory bills, to read evidence at the hearing, in support of any charges in the bill which happen to be denied, or not admitted in the answer; and the appellant in this cause not having admitted the lease stated in the bill, and the respondent being in possession of the deposition of Mr. *Duane*, taken in the former suit between him and the appellant, as already mentioned to that point, the respondent upon the 6th of *November* 1776, obtained an order for liberty to read these depositions as against the appellant, saving just exceptions; and publication being passed by rules in both the causes, the one brought by the respondent for staying waste, and the last mentioned cause for possession, they were both set down to be heard; and possessory causes being usually heard as short causes, the respondent therefore moved upon notice, that the possessory cause might be transferred from the grand list, to the list of short causes; which was ordered accordingly.

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On the 2d of *December* 1776, the appellant moved the Court in the two causes, *viz.* the suit for waste, and the suit for possession, that the proceedings in both the causes might be stayed, till the respondent had put in his answer to the bill filed by the appellant, on the 20th of *April* 1776; when the Court ordered, that those causes should keep their places, and that the respondent should put in his answer within ten days before the then next term: Accordingly the answer was put in, within the time limited by the order; by which answer the pretended agreement differing from the lease, was peremptorily and absolutely denied; and upon the state of the account set forth in the answer it appeared, that the appellant was the debtor instead of the respondent.

On the 26th of *February* 1777, the appellant applied again to the Court, by motion, that the appellant's cause upon his bill, and the causes upon the respondent's bills, might proceed and come on together; which motion was made just before the short cause upon the possessory bill came in turn to be called: When the Court, upon debate of the motion, was pleased to refuse the application.

The cause upon the possessory bill was heard and debated on the 26th and 27th of *February*, and also on the 1st and 3d of *March* 1777; and upon the said 3d of *March*, the Lord Chancellor was pleased to adjudge, that the defendants were guilty of the contempt charged against them in that cause, and thereupon decreed an injunction, directed to the Sheriff of the county of *Dublin*, commanding him to restore the respondent unto and quiet him in the possession of the said premises, until he should thereout be evicted by due course of law, or the further order of the Court to the contrary: But the Counsel for the defendants declaring, that they intended to appeal from this decretal order, the Lord Chancellor was pleased to respite the issuing such injunction for a month.

E. Thurlow.
J. Dunning.
F. Buller.

Accordingly the present appeal was brought, as well from the decree itself, as from the order of the 26th of *February* 1777, refusing to hear the causes together. And in support of the appeal it was said, that the appellant's cause, instituted for the purpose

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purpose of establishing his title to the possession of the demesne of *Luttrel's* town under the agreement for a demise, and for a specific execution of that agreement, having been instituted prior to the respondent's cause, and prosecuted with all possible diligence; and it being evident that the same proofs would be necessary for the appellant in both causes; it was apprehended, that his application that both causes should be brought to a hearing together, ought to have been granted, as then the danger of contradictory decrees in the different causes, would have been effectually avoided. That although possessory bills have, in some cases, been allowed in the Courts of Equity in *Ireland*, as a mode of proceeding for a landlord to recover possession of his lands, against a tenant holding over after the expiration of the term granted; and the tenant's breach of trust in not yielding up that possession, is, for the very purpose of maintaining such bill, construed into a force; actual, or constructive force, being absolutely necessary to support this bill; and although on such bill being filed, the tenant will not be suffered to avail himself as against his lessor, of any title to the possession derived from any other person; yet until the decree now appealed from, it never was known, that on such a bill, a tenant holding over after the expiration of the term, and claiming title to the possession under another deed executed by the same lessor, was evicted therefrom. And it was conceived, that possessory bills need not now be extended farther than they have hitherto gone; they were framed in times of national distraction, when, in the general confusion of the country, title deeds were frequently lost, and when therefore, the loss of possession would be the loss of title; they seem to have originated from the instructions, as to restitutions of possession, given to the President of *Munster*, in the reign of *James I.* grounded on the *English* statute of 8 *Hen. VI.* and unsupported by any *Irish* statute; but in the present settled state of the country, justice may be obtained in the ordinary course of law.

On the other side it was said, that the form of the proceeding in question, is by bill filed, praying an injunction to the party wrongfully in possession, commanding him to restore the possession to the plaintiff, the former possessor; and in case of disobedience, then an injunction to the sheriff, to put the plaintiff into possession; but

A. Wedderburn.
J. Madocks.

no

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no subpœna is prayed to appear and answer*. The truth of the bill is verified by an affidavit filed, which must prove these charges:

* The nature of these possessory bills, and the course of proceeding on them, are thus explained in *Howard's treatise on the rules and practice of the equity side of the Court of Exchequer in Ireland*, p. 304.

"The possessory, or injunction bill, is a summary method of proceeding, which hath been for many years past practised by Courts of Equity in this kingdom; and is used for the restoring of persons to the possession of their lands, who have been forcibly or fraudulently dispossessed, or for quieting parties in possession, according to the different circumstances of the case."

"And these bills are very frequent in this kingdom, by reason that by the many rebellions and troubles which have happened here from time to time, the Protestants were robbed and plundered, and their houses burnt, with their effects therein; by which means their deeds and titles have been lost or destroyed, which rendered the possession the best title to many estates. And therefore, it was found necessary to guard that possession against fraud or force, and to restore the person forcibly or fraudulently dispossessed; until the right could be tried by due course of law. Wherefore, if it appears to the Court, that the person who has been dispossessed or disturbed, has had a peaceable and quiet possession for three entire years before the filing of the bill, save the force or disturbance complained of, they will restore him, as possession is the semblance of right; and the party giving the disturbance, shall be left to his remedy in the ordinary course of law, either by an ejectment, or otherwise, as he shall think most proper."

"But where a landlord brings this bill against his tenant, for holding over after his term is expired, which is a forcible, or rather a fraudulent detainer; as where a person had made a lease for seven years to a tenant, the landlord or lessor, the day the seven years are expired, or the day after, demands the possession of the tenant or lessee, and he refuses to deliver it, the landlord need not make an affidavit of a triennial possession, and a title still in being; for in this case, the bill is founded upon the fraud, in which cases courts of equity have an original jurisdiction; for the tenant is considered in equity, as a trustee for the landlord; and upon this trust and confidence between the landlord and tenant, it is deemed a fraud if he refuse to give up the possession, or return it when his term is expired: But the landlord is to make it appear, by affidavit, that such a demise was, that the term in that demise is expired, and that the tenant holds over his term; and thereupon a bill is to be framed, with a prayer therein to be restored, and an injunction for that purpose, to be put into possession of the lands so demised."

"So when a party has been in possession for seven years as above, and before that seven years be expired, he may have got a further term, suppose of ten years, from his landlord, in that case the landlord cannot have an injunction; because, though the seven years be expired, yet the subsequent agreement for ten years is

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charges : That the title is undetermined ; that the plaintiff has been by himself, or his tenant, in quiet possession for three years ; and a forcible possession and detainer after the expiration of the lease, in case the premises have been in lease. And upon application to the Court, and reading the affidavit, to see that the case is both proper and true, the writ of injunction to the party is ordered, and he is served with it. In case the writ be disobeyed, it becomes a matter of contempt, and the Court may issue an attachment for the contempt ; upon which an order is obtained of course, for an injunction to the Sheriff. If before the entry of the attachment, and after service of the injunction to the party, he enters an appearance, he is then to be examined upon interrogatories touching his contempt ; and interrogatories may be exhibited for that purpose. And as the writ issued upon

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“ a continuation of that possession, which was first given for seven years: And if
 “ the landlord should force or disturb the tenant in his possession, he, upon filing a
 “ bill and setting forth his case, would be quieted by injunction, upon proper
 “ affidavits of the matter, against his landlord.”

“ But in these suits, it seems that there is no necessity to go into the right, or
 “ the title, but into the question of the possession only, so that the plaintiff has a
 “ title still in being; and a seisable title will be sufficient: And in a late case be-
 “ tween Sir *Fitzgerald Aylmer* and others, plaintiffs, *Barnwell Fitzgerald* and others,
 “ defendants, which depended in Chancery, before the late Chancellor, Lord Vis-
 “ count *Jocelyn*, upon a possessory bill, an issue being directed, upon the trial at the
 “ assizes, the plaintiffs were suffered to go into evidence of the original right and
 “ title to the lands in question, whereupon the jury found a verdict for the plain-
 “ tiffs: But upon shewing this matter to the Court of Chancery, his Lordship was
 “ pleased to set aside the verdict, and ordered a new trial; and afterwards upon
 “ the second trial, the plaintiffs not being suffered to give evidence of any matter,
 “ except such as tended to shew the triennial possession, the jury found a verdict for
 “ the defendants; and the plaintiffs having applied to the present Lord Chancellor
 “ for a new trial, it was refused; and the cause being afterwards heard, an injunc-
 “ tion went to the sheriff, with costs.”

The following instances of this proceeding between landlord and tenant, were certified from the Register's book of the Court of Chancery in *Ireland*, on occasion of the present appeal. *Holt v. Reilley*, 24th February 1758. *French v. Wade*, 29th of June 1758. *Lord Annesley v. Radford*, 16th of June 1763. *Cullen v. Dillon*, 28th of June 1770. *Parsons v. Butler*, 25th of June 1772. *Cunningham v. Mason*, 2d of July 1772. *Nicholson v. McKiernan*, 19th of November 1772. *Evans v. Fitzpatrick*, 10th of July 1773. *Lady Shelburne v. Tracy*, 13th of July 1773. *Maine v. Hicker*, 15th of July 1773. *Higginbottom v. Power*, 20th of July 1773. *Gorman v. Brown*, 11th of May 1775.

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an *ex parte* application, therefore the defendant, in his examination, is at liberty to deny all or any part of the case made by the bill; and to insist upon such matters as go to the point of possession, or the contempt, but not to the right. If the plaintiff thinks it proper, he may examine witnesses in support of his bill; and so may the defendant examine witnesses in support of his answer, and therefore the cause cannot be set down, till a rule is given to publish: But when that is given and expired, the cause is set down, and transferred to the paper of short causes, at the request of either party; as such causes, from their nature, require dispatch.

In the present case, the possession of the estate in question from before the year 1735 was admitted; the execution of the lease, though not admitted, was proved; the payment of the rent, by being accounted for, was admitted; the expiration of the term was self-evident; the demand of possession, and the refusal, together with the locking up the gates and doors by the appellant's order, to resist the taking possession, was admitted: So that there could be no controversy upon the respondent's case. The appellant, however, by his answer, aimed at setting up a title; and by his petition of appeal complained, that the Court read this part of the answer, only for the purpose of seeing what the appellant had put in issue, but would not receive the answer as evidence. But it was submitted, that the Court judged right in looking upon this part of the answer in that view, as the setting up a title was wholly inconsistent with the nature of the proceeding; for the suit being possessory only, the Court was only to see whether the right to the possession, under which the appellant originally entered, still remained in force, or not; and if it did not, the appellant's opposition was an usurpation of the possession. Any claim of a new and different right, accrued since the appellant originally entered, was a matter to be made out by him in the proper course of law, and he was not to be his own judge of such claim; nor would the Court try and determine upon such a claim, in a suit wherein the Court was exercising the jurisdiction and authority with which it was armed, of not suffering the possession of lands to be changed but by due course law, and of not suffering the appellant to take advantage of a tortious possession, and put the respondent to his remedy. The Court therefore rightly considered those parts of the answer which set up a new title, as read only for the purpose of seeing what

what case the appellant made, and did not receive the same as evidence of a right, which could not be contested in that suit; and rightly decreed an injunction to restore the possession. So that if the appellant had a right of entry for breach of a condition, he might be redressed by the laws, and not by his keeping possession with violence and a strong hand. As to the order of the 26th of *February* 1777, by which the Court refused to delay the possessory cause, and to permit that and the other causes to come on together, the Court justly refused to make such an order; because the first of the causes was brought by the respondent to stay waste, and to account for timber fallen; and was totally unconnected with the possessory cause, and therefore, it was improper that the one should occasion a delay of the other. And as to the cause upon the appellant's bill, it would have been unjust, as well as inconsistent with the nature of the proceedings, to have delayed the possessory cause upon the mere suggestion of an agreement in that bill, which, by the respondent's answer to it, was positively denied.

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After hearing Counsel on this appeal, it was ORDERED and ADJUDGED, that the same should be dismissed; and the order and decree therein complained of, affirmed.

DECREE affirmed.
M. S. Jour.
sub anno 1777.
p. 832.

John Horne, Clerk, - Plaintiff, }
Our Sovereign Lord the King, Defendant, } In Error. Case 45.

11th May, 1778.

IN *Michaelmas* Term 1776, an information was filed in the Court of King's Bench against the plaintiff, by his Majesty's Attorney General, on behalf of his Majesty, for writing, printing and publishing two seditious libels.

The first count in the information stated, "That the said John Horne, being a wicked, malicious, seditious and ill-disposed person, and being greatly disaffected to our said present Sovereign Lord the King, and to his administration of the government

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“ ment of this kingdom, and the dominions thereunto belong-
 “ ing, and wickedly, maliciously and seditiously intending, de-
 “ vising and contriving, to stir up and excite discontents and
 “ seditions amongst his Majesty’s subjects, and to alienate and
 “ withdraw the affection, fidelity and allegiance of his said Ma-
 “ jesty’s subjects from his said Majesty, and to insinuate and
 “ cause it to be believed, that divers of his Majesty’s innocent
 “ and deserving subjects, had been inhumanly murdered by
 “ his said Majesty’s troops, in the province, colony or planta-
 “ tion of the *Massachusetts Bay* in *New England*, in *America*,
 “ belonging to the Crown of *Great Britain*, and unlawfully and
 “ wickedly to seduce and encourage his said Majesty’s subjects in
 “ the said province, colony or plantation, to resist and oppose his
 “ Majesty’s government, on the 8th day of *June*, in the 15th
 “ year of the reign of our present Sovereign Lord *George* the
 “ Third, by the grace of God of *Great Britain, France* and
 “ *Ireland*, King, Defender of the Faith, &c. with force and
 “ arms at *London* aforesaid, in the parish of *St. Mary le Bow*, in
 “ the ward of *Cheap*, wickedly, maliciously and seditiously did
 “ write and publish, and cause and procure to be written and
 “ published, a certain false, wicked, malicious, scandalous and
 “ seditious libel, of and concerning his said Majesty’s govern-
 “ ment, and the employment of his troops, according to the
 “ tenor and effect following: *Kings Arms Tavern, Cornhill*,
 “ *June* 7th 1775, at a special meeting this day of several mem-
 “ bers of the Constitutional Society, during an adjournment, a
 “ gentleman proposed, that a subscription should be immediately
 “ entered into, (by such of the members present who might
 “ approve the purpose) for raising the sum of 100 *l.* to be applied
 “ to the relief of the widows, orphans, and aged parents, of
 “ our beloved *American* fellow subjects, who faithful to the
 “ character of *Englishmen*, preferring death to slavery, were, for
 “ that reason only, inhumanly murdered by the King’s (mean-
 “ ing his said Majesty’s) troops, at or near *Lexington* and *Concord*,
 “ in the province of *Massachusetts* (meaning the said province,
 “ colony, or plantation of *Massachusetts Bay* in *New England*,
 “ in *America*), on the 19th of last *April*, which sum being im-
 “ mediately collected, it was thereupon resolved, that Mr.
 “ *Horne* (meaning himself the said *John Horne*) do pay to mor-
 “ row into the hands of Messrs. *Brownes* and *Collinson*, on the
 “ account of Dr. *Franklin*, the said sum of 100 *l.* and that Dr.

“ *Franklin*

“*Franklin* be requested to apply the same to the abovementioned purpose. *John Horne*.—(meaning himself the said *John Horne*) In contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present Sovereign Lord the King, his Crown and dignity.” There were other counts in the information, charging the plaintiff with causing the same libel to be printed in the *London Packet*, or *New Lloyd’s Evening Post*, and the *Morning Chronicle*, or *London Advertiser*.

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The count on the second libel was as follows, viz. “that the said *John Horne* being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously intending, devising and contriving as aforesaid, afterwards to wit, on the 14th day of *July*, in the 15th year aforesaid, with force and arms, at *London* aforesaid, in the parish and ward aforesaid, wickedly, maliciously and seditiously, did write and publish, and cause and procure to be written and published, a certain false wicked, malicious, scandalous and seditious libel of and concerning his said Majesty’s government, and the employment of his troops, according to the tenor and effect following: I (meaning himself the said *John Horne*) think it proper to give the unknown contributor this notice, that I (again meaning himself the said *John Horne*) did yesterday pay to Messrs. *Brownes* and *Collinson*, on the account of *Dr. Franklin*, the sum of 50*l.* and that I (again meaning himself the said *John Horne*) will write to *Dr. Franklin*, requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved *American* fellow subjects, who faithful to the character of *Englishmen*, preferring death to slavery, were (for that reason only) inhumanly murdered by the King’s (meaning his said Majesty’s) troops, at or near *Lexington* and *Concord* in the province of *Massachusetts* (meaning the said province or colony, or plantation of the *Massachusetts Bay* in *New England* in *America*) on the 19th of last *April*. *John Horne*.—(again meaning himself the said *John Horne*) In contempt of our said Lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present Sovereign Lord

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"the King, his crown and dignity." And counts were added for causing this last libel to be printed in the public news papers.

In *Easter* Term 1777, Mr. *Horne* pleaded Not Guilty to this information. And at the sittings after *Trinity* Term following, the information was tried by a special jury of the city of *London*, and the defendant found guilty of all the offences therein charged.

In *Michaelmas* Term 1777, Mr. *Horne* moved the Court of King's Bench, in arrest of judgment; alledging, that the information was insufficient, inasmuch as it did not aver that any rebellion had been in the colony of the *Massachusetts Bay*, or that certain persons who were denominated the King's troops, had been employed by his Majesty and his government to quell that rebellion, or that any engagement had happened between the King's troops and the rebels, or that any of the rebels had been slain in such engagement by the King's troops, or that the advertisements, or the charge of murder therein contained, had any relation to such slaughter of the rebels, or to the action of the King's troops. He argued, that nothing can be intended beyond that which expressly is averred in the record. On the other hand, if by any possible construction or intendment, those expressions which are said to be criminal, can receive an innocent sense, consistently with what is expressly averred in the record, the consequence is, that no crime is sufficiently alledged. Troops may mean flocks or companies of strollers, or deserters, and if in any supposable circumstance, the words complained of might have been said innocently, there was no crime charged in this record.

But these objections were, upon deliberation, unanimously overruled by the Court; and judgment pronounced, that the said *John Horne* should pay a fine to the King of 200*l.* and be imprisoned for the space of 12 months, and until that fine should be paid; and that upon the determination of that imprisonment, he should find sureties for his good behaviour for three years, himself in 400*l.* and two sureties in 200*l.* each.

J. Dunning.
J. Lee.

To reverse this judgment, Mr. *Horne* brought a writ of error in Parliament, and on his behalf it was argued, that it is a principle in the law of *England*, that in criminal prosecutions, the information, or indictment, must contain in itself a certain
and

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and explicit charge of the offence intended to be imputed to the defendant, and no defect of certainty in the charge, can be helped or supplied by any proof, and still less by presumption or intendment, either in the jury who give the verdict, or in the Court which pronounces judgment upon it. It is equally true, that all penal charges ought to be taken most favourably for the subject, in every stage of the prosecution; so that if it appears doubtful, whether the fact alledged in the information or indictment be necessarily criminal, or may possibly be innocent, the prosecution shall fail; and though the jury find a general verdict, such verdict ought not to be construed by the Court, to find any thing beyond the plain and certain allegations in the indictment or information. In this case the jury had found, that the King's troops mentioned in the advertisement, meant "his Majesty's troops"; for this, and the publication by the defendant, were facts charged, and therefore might be properly said to have been found. If it should be admitted, which was not found, that the troops, meant his majesty's army in *America*, there was nothing in the information that extended the imputation on those troops, to his Majesty or his ministers, unless it was in the introductory words, which had been resorted to, as charging the advertisement to be written, "of and concerning his Majesty's government, and the employment of his troops." If the jury were to be understood to have found it to be so written, (though from the company that passage kept with the words *false, wicked, malicious, scandalous, seditious*, it might more properly be considered as a matter of inference than of charge) it would not of necessity follow, that the employment of the troops with which Mr. *Horne* expressed his dissatisfaction, was an employment by his Majesty, or by any person in authority under him. It was equally consistent with a supposition, that the troops, in the instance complained of, employed themselves in acting without, or even contrary to the orders of those to whose orders they ought to have conformed. Nor did it follow, that because the advertisement was found to have been written concerning his Majesty's government, that it therefore necessarily imported an intention to arraign that government. Armies are properly considered as among the instruments of government, and are properly employed, whenever they are so employed, in the defence of a just government. Whoever writes therefore concerning his Majesty's armies, may be said to write concerning

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concerning his Majesty's government. But the supposed libel carried no imputation against his Majesty, or his government; unless it should be understood to mean, that the misbehaviour which it was supposed to impute to the troops, was in an instance wherein they were acting in due obedience to legal orders, under an authority derived from his Majesty, but which was no where charged, and consequently not found. In order to have supported the information, in the manner in which probably the prosecutor wished to have it understood, he ought to have shewn by proper averments, that there was at the time a rebellion existing in *America*; that the troops were sent thither to suppress it; that they were in the act of exerting themselves in obedience to proper orders, towards this object, and that though the loss of lives was among the consequences of that exertion, it was no murder, nor in any sense a violation of law; but, on the contrary, perfectly justified by the occasion. Why averments to this effect were not to be found in the record, it was not difficult to conjecture, to those at least who understand that averments must be proved: And it might not be thought certain, that a jury would be found who would assent to the truth of these propositions. It would be no answer to say, that all this was notorious; or that at the trial it was proved; for if it were so, which was by no means admitted, it was perfectly immaterial; if the principle be as it was conceived to be, that the judges are to receive or use no other knowledge of the facts essential to constitute a criminal charge, but what they collect from the record.

E. Thurlow.
A Wedderburn.

On the other side it was contended, that the crime of a libel consists in opprobrious words or signs, written, made, exhibited, or published, concerning some person, or other subject, which it is criminal so to revile. The accusation must therefore state the opprobrious words or signs, and they must be applied to the person or thing supposed to be reviled; but no technical form of words is necessary for that purpose. If the natural and apparent sense of the words themselves be opprobrious, and require no other medium to fix such meaning upon them, no *innuendo*, or averment to support it, can be necessary to raise an apparent meaning. If the application of such opprobrious words, be expressly made in the phrase of the libel, no *innuendo*, or averment to support it, can be wanting

ing to raise an express application. It is a well known rule, that judges are to understand a libel as others do, without straining to find a loop-hole to palliate the offence; which in some measure would be to encourage scandal. It would be a ridiculous absurdity to say, that a writing understood by the meanest capacity, cannot possibly be understood by a judge and jury; therefore judges will not resort to every *possible* construction, only to avoid the *natural* one; much less give a different sense to the words, by supposing circumstances which, if they exist, should be proved. The words complained of, conveyed, in their natural and apparent meaning, a gross reflection, the imputation of an heinous and hateful crime, upon the employment of the national force, and consequently upon his Majesty's government, of which the employment of that force is an important part. These words *the King's troops*, in a common and obvious sense, mean that national force which the law takes notice of, and authorizes. The literal meaning of the words was confirmed by the context, and it was impossible to believe that any *English* reader had put another interpretation upon them, much less had any such reader mistaken them to mean *flocks*, or *companies of strollers*, &c. as the objection idly supposed. The application of these opprobrious words to the King's government, and the employment of his troops, not only appeared in the phrase of the libel itself, but was expressly charged in the information, and proved even by the defendant's witnesses, and found by the jury; that matter therefore was also concluded. The averments suggested in the defendant's argument, were by no means necessary to constitute a state of this crime. For supposing there had been no rebellion, or troops employed to suppress it, or engagement by the King's troops, or slaughter made of the rebels, the guilt of this calumny would not have been diminished, by its total want of foundation or colour of truth.

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After hearing counsel on this writ of error, the following question was put to the Judges, "Whether the writing contained in the information, is, in point of law, sufficiently charged to be a libel upon his Majesty's government?" And the Lord Chief Justice of the Court of Common Pleas having delivered the unanimous opinion of the judges in the affirmative;

Judgment affirmed.
M. S. Jour.
sub anno,
1778. p. 904.

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it was ORDERED and ADJUDGED, that the judgment given in the Court of King's Bench should be affirmed; and that the record should be remitted, &c.

Case 46. *Joseph Rann* Clerk, and *Ar-*
thur Taylor, Executors of } Plaintiffs.
Mary Hughes, deceased, }
Isabella Hughes, Defendant. } In Error.

14th May, 1778.

THE Plaintiffs in *Hilary* Term 1774, brought their action against the defendant, in which they declared as follows: viz. *Middlesex* (to wit), *Joseph Rann* clerk, and *Arthur Taylor*, executors of the last will and testament of *Mary Hughes* deceased, complain against *Isabella Hughes*, being in the custody of the Marshal of the Marshalsea of our sovereign Lord the King, before the King himself, for that whereas, on the 11th day of *June*, in the year of our Lord 1764, at *Westminster*, in the said county of *Middlesex*, divers disputes, differences and controversies had arisen, and were then and there depending, between the said *Mary Hughes* in her lifetime, and one *John Hughes*, and thereupon, for the putting an end to the said disputes and differences, the said *Mary Hughes* in her lifetime, and the said *John Hughes* on the same day and year aforesaid, at *Westminster* aforesaid, submitted themselves to stand to the award, order, arbitrament, final end and determination of *Francis Wheler*, of the *Inner Temple*, *London*, Esq; and *Richard Geast* of *Blythe Hall* in the county of *Warwick*, Esq; arbitrators indifferently named, elected and chosen, as well on the part and behalf of the said *John Hughes*, as the said *Mary Hughes*, to arbitrate, award, order, judge and determine of and concerning the said disputes, differences and controversies, so as the said award should be made in writing, ready to be delivered on or before the 29th day of *September* then next ensuing; and whereas afterwards, and within the time in that behalf

" limited

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“ limited for the said *Francis Wheler* and *Richard Geast* to make
 “ their award concerning the premises as aforesaid, (to wit) on
 “ the said 29th day of *September*, in the said year of our Lord
 “ 1764, the said *Francis Wheler* and *Richard Geast* in due man-
 “ ner made their award, order and determination in writing, of
 “ and concerning the premises, so referred to them as aforesaid,
 “ then ready to be delivered to the said *John Hughes*, and *Mary*
 “ *Hughes*, and bearing date the same day and year last aforesaid,
 “ and thereby they the said *Francis Wheler* and *Richard Geast*
 “ did then and there, amongst other things, award and order,
 “ that the said *John Hughes*, his heirs, executors or administra-
 “ tors, should on or before the 25th day of *March* next ensu-
 “ ing the date of the said award, well and truly pay or cause
 “ to be paid unto the said *Mary Hughes*, her executors, admi-
 “ strators, or assigns, the sum of 983*l.* 0*s.* 2*d.* with interest
 “ for the same, after the rate of 4*l.* by the hundred, by the year,
 “ from the day of the date of the said award; and the said
 “ *Francis Wheler* and *Richard Geast* did then and there, by the
 “ their said award, further award and order, that the said *John*
 “ *Hughes* should within the space of one month then next en-
 “ suing, execute to the said *Mary Hughes*, a general release of
 “ all actions, suits, damages, accounts, reckonings and demands
 “ whatsoever, from the beginning of the world to the day of the
 “ date of the therein recited bonds of arbitration; and that the
 “ said *Mary Hughes* should within the same time, in like man-
 “ ner execute to the said *John Hughes*, a like general release of all
 “ actions, suits, damages, accounts, reckonings and demands
 “ whatsoever, from the beginning of the world to the day of
 “ the date of the said recited bonds of arbitration; of all which
 “ said premises, he the said *John Hughes*, afterwards (to wit)
 “ on the said 29th day of *September*, in the year aforesaid, at *West-*
 “ *minster* aforesaid, had notice: And the said *Joseph* and *Arthur*
 “ in fact say, that the said *John Hughes* afterwards, and after
 “ the making of the said award, (to wit) on the first day of
 “ *October*, in the year of our Lord 1765, at *Westminster* aforesaid,
 “ died intestate, possessed of and entitled unto divers goods, chat-
 “ tels and effects of great value, (to wit) of the value of
 “ 3000*l.*: And the said *Joseph* and *Arthur* further say, that ad-
 “ ministration of all and singular the goods, chattels and cre-
 “ dits, which were the goods, chattels and credits of the said
 “ *John Hughes* at the time of his death, after the death of the
 “ said

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“ said *John Hughes*, (to wit) on the 26th day of *October*, in the
 “ year of our Lord 1770, at *Westminster* aforesaid, by *Frederick*,
 “ by Divine Providence Archbishop of *Canterbury*, primate of
 “ all *England* and Metropolitan, was in due manner committed
 “ to the said *Isabella* (to wit) at *Westminster* aforesaid, and by
 “ virtue thereof, she the said *Isabella* afterwards, (to wit) on
 “ the same day and year aforesaid, at *Westminster* aforesaid, became
 “ and was possessed of divers goods and chattels which were the
 “ goods and chattels of the said *John Hughes* at the time of his
 “ death: And the said *Joseph* and *Arthur* further say, that the
 “ said *Mary Hughes* afterwards (to wit) on the 23d day of *Fe-*
 “ *bruary*, in the year of our Lord 1766, at *Westminster* aforesaid,
 “ made her last will and testament in writing, and thereby con-
 “ stituted and appointed them the said *Joseph* and *Arthur* execu-
 “ tors thereof, and afterwards, (to wit) on the same day and
 “ year aforesaid, at *Westminster* aforesaid, died: And the said
 “ *Joseph* and *Arthur* further say, that the said sum of 983 *l. o.s.*
 “ 2*d.* mentioned in the said award, at the time of the death of
 “ of the said *Mary Hughes*, was wholly due, owing and unpaid
 “ to the said *Mary Hughes*, by reason of which premises, the said
 “ *Isabella*, as administratrix as aforesaid, became liable to pay to the
 “ said *Joseph* and *Arthur*, as executors as aforesaid, the said sum
 “ of 983 *l. o.s.* 2*d.* in the said award mentioned, together with
 “ interest for the same from the day of the date of the said award,
 “ after the rate of 4 *l.* by the hundred, by the year, and being so
 “ liable, she the said *Isabella*, in consideration thereof, afterwards
 “ (to wit) on the same day and year last aforesaid, at *Westminster*
 “ aforesaid, in the said county, undertook and to the said *Joseph* and
 “ *Arthur*, then and there faithfully promised to pay them the
 “ said sum of money in the said award mentioned, together with
 “ interest for the same as aforesaid, when she the said *Isabella*
 “ should be thereunto afterwards requested.” There were other
 counts in the declaration, but those were by the verdict rendered
 immaterial.

To this declaration, the defendant pleaded several pleas;
 1st. That she never made any such promises as the plaintiffs had
 alledged. 2d. That she had fully administered all the effects of
John Hughes. 3d. That the said *John Hughes*, at his death was
 indebted by bond to one *Henry Jackson*, in the sum of 1400 *l.*
 and that she the defendant *Isabella* had fully administred all the
 effects

effects of the said *John Hughes*, except to the value of 5*l.* which were not sufficient to satisfy the bond debt due to *Jackson*.

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The plaintiffs replied and took issues on these pleas, and the cause was tried before Lord *Mansfield*, at the Sittings in *Westminster* Hall, after *Trinity* Term 1774; when the jury found a verdict for the plaintiffs on the first count of the declaration, that the defendant did make the promise therein alledged, and gave the plaintiffs 483*l.* damages, and 40*s.* costs; the jury also found, that the defendant *Isabella* had fully administered the effects of *John Hughes*.

In *Michaelmas* Term 1774, a motion was made by the defendant, in the Court of King's Bench, to set aside the verdict, and for a new trial; but the Court were unanimously of opinion, that the verdict was well founded, both on the facts and the law of the case; whereupon in *Easter* Term 1775, judgment was entered up against the defendant generally, for 547*l.* damages and costs.

Soon afterwards, the defendant brought a writ of error in the Exchequer Chamber, where the case was twice argued; and in *Michaelmas* Term 1776, the judgment of the Court of King's Bench was reversed.

But to reverse this judgment of reversal, the plaintiffs brought a writ of error in Parliament; and, on their behalf it was said, that the debt which they recovered by the first judgment, was justly due from *John Hughes*, at the time of his death, and this had never been denied; but it was insisted by the defendant, that notwithstanding the debt continued unpaid, and notwithstanding she did make the promise stated in the declaration, and that every fact therein alledged by the plaintiffs was true, yet she was not personally liable to pay the damages given by the jury. I. Because the promise stated in the declaration, and found by the jury, was not a personal promise by her, but merely in the character of administratrix; and therefore she was not liable to pay the debt out of her own effects, but so far only as she had assets, and she had no assets. II. Supposing it to be a promise to pay the debt out of her own effects, and that the

F. Buller.
J. Dunning.

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charge in the declaration was to be so understood, yet that promise was void in law.

In answer to the first objection it was said, that in all actions against executors or administrators, where they are sued in that character only, the declaration usually begins with describing and charging them as such; but in this case the complaint was exhibited against the defendant as for a personal demand, which the plaintiffs as executors had against her; and when she was first named, she was called upon to answer personally, and not by the name or description, or with the addition, or in the character of administratrix: And it was conceived, that no pleader reading this declaration, could hesitate to say it was a declaration against the defendant in her own right, and not as administratrix. The declaration then stated what was the original demand against *John Hughes*, whose representative the defendant was, and charged, that after his death, she having obtained the administration of his effects, and possessed herself of them, became liable to answer this demand as administratrix, and being so liable she promised to pay it. By these words it was submitted, the plaintiffs had stated how long she continued liable to pay the debt as administratrix only, and when she made herself liable to pay it personally; so long as she was liable to be called upon in the character of administratrix, and to pay it out of effects which belonged to *John Hughes* only, she was stated to be liable as administratrix; but the instant she made an express promise to pay the debt, she became personally liable, and then was no longer charged as administratrix; the allegation that she promised was general, without reference to the administration, or to the assets which she had as administratrix; but if it had been alledged, that she promised to pay in her own right, or out of her own effects, the addition of those words would only have been the addition of that which was necessarily implied and understood without them.

The second objection, that the promise was void, was supported on two grounds: 1st. That it did not appear by the declaration, that the promise was in writing; or 2dly. That there was any consideration for the promise. As to the first ground, it is an adjudged point, that the statute of frauds, which requires such promise to be in writing, makes no alteration in the

mode of pleading; and therefore, though the promise be not expressly alledged in the declaration to have been made in writing, yet it must necessarily be presumed to have been so; for if it had not been so proved at the trial, which in fact it was, the plaintiffs could not have obtained a verdict; and after a verdict, every thing is presumed which was necessary to be proved on the trial. And as to the second ground it was submitted, that in the case of a promise in writing, which this must be taken to be, it is not necessary to alledge any consideration in the declaration; but if it were necessary, there was a sufficient consideration for the promise appearing upon this declaration. In reason, there is little or no difference between a contract which is deliberately reduced into writing, and signed by the parties, without seal, and a contract under the same circumstances, to which a party at the time of signing it puts a seal, or his finger on cold wax. In the case of a deed, *i. e.* an instrument under seal, it must be admitted that no consideration is necessary; and in the year 1765, it was solemnly adjudged in the Court of King's Bench*, that no consideration was necessary when the promise was reduced into writing. That opinion has since been recognized in the same Court, and several judgments founded upon it; all which judgments must be subverted, and what was there conceived to be settled law, totally overturned, if the plaintiffs in this cause were not entitled to recover. But further: If a consideration were necessary, a sufficient one for the promise appeared upon the declaration in this case. The defendant was the administratrix of *John Hughes*, she had effects of his in her hands, she was liable to be called upon by the plaintiffs in an action, to shew to what amount she had assets, and how she had applied them; and under these circumstances, she promised to pay the demand which the plaintiffs had against her. But it was said, that it did not appear on the declaration, that she had effects of *John Hughes*, sufficient to pay all his debts. To what amount she had effects, or what debts were due from *Hughes* at his death, was known to the defendant only, and not to the plaintiffs. They applied to the person against whom they had a right of action, she promised to pay them, and under that promise they rested satisfied. This promise, if it did not import an admission of assets, must naturally be understood to mean, that the defendant would pay the debt whether she had assets or not; and if it was not so meant, it could only be intended to amuse, mislead, and deceive the

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* *Pillans v. Van Mierop.*
3 Burr. 1663.

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the plaintiffs. And after such a promise, the defendant ought not to be permitted to say, that she had not sufficient assets to pay this debt.

J. Wallace.
E. Bearcroft.

On the other side it was said, that in order to subject the proper estate of the defendant, the administratrix to the payment of the debt of the intestate, stated in the declaration, in consequence of the promise made by her to the plaintiffs, it was necessary, 1st, That there should be a sufficient consideration for the promise, in point of law; and 2dly, that such promise, or some memorandum or note thereof, should be in writing, signed by the defendant, or some other person authorized by her.

As to the first point, the duty of an executor or administrator is to collect the effects of the deceased, and apply the same as far as they will extend, to the payment of the debts of the deceased, in a due course of administration, and to distribute the surplus, if any, amongst the legatees or next of kin; no creditor can claim from the representative beyond the amount of the effects, and yet there may be inducements to a representative to enter into an engagement with a creditor, for the positive payment of his debt, in consideration that the creditor will give him time for such payment, or will abstain from pursuing legal measures to recover his demand, or the like; and the creditor grants the indulgence. In these cases, there is a reasonable foundation to interpret the promise of the executor, as an additional security to the creditor; who, in confidence thereof, accedes to terms of forbearance and delay, which may be attended with the loss of witnesses, and other consequences injurious to the creditor. But the present case did not afford a pretext of any benefit or indulgence stipulated for by the defendant, or any thing to be done or omitted by the plaintiffs, as a consideration for the promise stated to have been made by the defendant; and which the plaintiffs contend, ought to subject her, out of her own estate, to the payment of the debt claimed; though it appeared upon the record, that the defendant had faithfully discharged her duty, and honestly applied the effects of the deceased in the payment of his debts, in a proper course of administration. It was clear, that neither the plaintiffs or their attorney, or any other concerned for them, had at the commencement of this suit, or for some time afterwards, any idea of the defendant's being liable out of her

her own effects to satisfy the demand. She was charged to be liable as administratrix, and being so liable, promised to pay; which must be understood in the same character, and out of the effects of the deceased; other counts were added, which charged her merely as administratrix, and if the first count charged her in a different light, requiring a different judgment, the declaration was insufficient to support any of the demands. She pleaded matters in her defence to the action, which were admissible only in that character, and the plaintiffs took issue upon them; thus far it was certain both parties understood the promise stated in the declaration, and the effect of it, in the same light. The plaintiffs however, in the subsequent proceedings, adopted a different conduct, and had been forced to contend, that the defendant was liable to the payment of the debt and costs out of her own effects, and entered a judgment against her; not even adhering to the established course of proceeding, in a case where an executor or administrator is liable out of his own effects to satisfy a debt of the deceased, which directs the debt and costs to be levied out of the effects of the deceased, if there be sufficient for the purpose, and if not, then to be levied of the proper effects of the representative; but the judgment was entered so as to subject the person or effects of the defendant in the first instance to an execution, without regard to the effects of the deceased.

And as to the second point, that the promise ought to be in writing; it was said, that this requisition was founded in positive law, for the protection of executors and administrators, by the statute 29 *Charles II.* c. 3. The necessity of an undertaking in writing was not disputed; but it was contended, that there was no occasion expressly to alledge in the declaration, that such promise was in writing; it was sufficient to prove it at the trial, and after a verdict it must be presumed, that a promise in writing was proved. In some cases it is certainly not necessary to alledge the promise to be in writing, and after verdict such intendment shall be made; but that is, where the plaintiff could not maintain his action unless the promise was in writing, nor could he obtain a verdict without proof of it, as where one person undertakes for the debt or default of another; but in an action against an executor or administrator, the plaintiff may maintain his action upon the parol promise of the defendant, and take

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a judgment to levy his debt upon the assets of the deceased; and therefore to warrant a judgment, charging the proper estate or the executor or administrator, it must appear that the promise was in writing, which was not alledged in the present case.

Judgment
affirmed.
M. S. Jour.
sub anno 1777.
p. 94^l.

After hearing Counsel on this writ of error, the following question was put to the Judges; *viz.* “Whether sufficient matter appears upon this declaration, to warrant, after verdict, the judgment entered up against the defendant in her personal capacity?” And the Lord Chief Baron of the Court of Exchequer having delivered the unanimous opinion of the Judges in the negative, it was ORDERED and ADJUDGED, that the judgment given in the Court of Exchequer, reversing the judgment of the Court of King’s Bench, should be affirmed; and that the record should be remitted, &c.

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A

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7 D the

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An administrator *de bonis non*, verbally promising to pay an annuity given by the testator's will, does, under certain circumstances, make himself personally liable to such payment.

ibid.

A. having borrowed 30,000 *l.* of *B.* transferred to him 14,000 *l.* *East India* stock, by way of pledge, for the repayment of the money so borrowed; and *B.* agreed, that he would not sell any part of the stock, until after the expiration of one year from that time; but nevertheless *B.* sold the stock on the very same day. Held, that he was answerable for the money received by such sale, with interest.

vi. 444

The rule that a parol agreement ought not to be admitted to contradict an agreement in

writing, is generally true; but it is also true, that a written agreement may be waived, or varied by parol. *Vol. vi. page 587*

J. S. agrees to sell his estate to *B.* in consideration of an annuity for his life. The time limited for the conveyance was the 31st of *October*; but the annuity was to commence, and *A.* was to have the rents and profits of the estate, from the 5th of *April* preceding. *J. S.* died on the 12th of *November*, before any conveyance was executed. On a bill brought by *A.* for a specific performance of this agreement, the court dismissed it, but without costs. vii. 184

Alien.

By the known law of the land, no alien born, can take by grant, devise, or other purchase, any freehold, or chattels real for his own benefit; but can, and does in such cases, take for the benefit of the crown. Yet this disability being neither a penalty or forfeiture, the alien cannot demur to an information for discovering the place of his birth, in order to establish the fact of alienage. v. 91

On an information being filed against a person who had been in the service of the *East India* company abroad, for an account of his dealings and transactions, the defendant pleaded that he was an alien, but the plea was over-ruled; it appearing, that the defendant had acted both in a civil and judicial capacity, and had taken the oaths of allegiance, &c. vii. 35

Annuity.

A. for 2100 *l.* grants an annuity for his own life, of 300 *l.* a year, to *B.* and charges it upon an estate represented to be of the clear yearly value of 1000 *l.* and *B.* agrees, that *A.* shall be at liberty to redeem the annuity, at six months notice, on payment of the purchase money and all arrears. *A.* suffers the annuity to run greatly in arrear; and the estate turns out to be subject to prior incumbrances, the interest whereof exceeded its annual income. On a bill filed

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filed against *A.* for a specific performance of his covenant to pay this annuity, the court decreed accordingly; and held, that *A.* was not obliged to resort to his remedy at law, or to the insufficient security of the estate. Vol. v. page 240

Appeal.

Such defects in a decree as the court will rectify upon motion, are not sufficient grounds for an appeal. ii. 361

No appeal lies to the House of Lords against a decree, before it is signed by the Lord Chancellor. iv. 194

Nor from an order of a Court of Equity to shew cause, before such order be made absolute. iv. 368

In what case an appeal may be brought from an old decree, by a person who was no party to the suit. iv. 383

No appeal lies to the House of Lords in *Ireland*, from the judgment or decree of any Court in that kingdom. iv. 390

N. B. This is now altered by the statute 6 *Geo. I. c. 5.* being repealed by statute 22 *Geo. III. c. 53.*

Where a party dies pending an appeal, the revival of the suit below, is a sufficient revival of the appeal. iv. 553

In what cases a party is barred from appealing against a decree. iv. 583. vi. 573

No appeal to the House of Lords lies against an order awarding a commission of idiocy, or lunacy, by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal. vi. 329

Nor against any proceedings touching the awarding or issuing of such commissions. vi. 331

By a standing order of the House of Lords, of the 24th of *March 1725*, the time for receiving appeals is limited to five years from the signing and inrolling of the decree; and therefore, upon an appeal brought from two decrees, of the 15th of *July 1728*, and the 5th of *February 1731*, which were inrolled in *March 1764*, the House declared, that the appeal ought not to have been received, and accordingly it was dismissed. vi. 395

In making this order, the House is said to have considered the inrollment of any decree pronounced by the Court of Chancery, as being by *legal relation*, the act of the same day on which the decree was pronounced.

Vol. vi. page 404

Where a party to a suit sells and conveys all his right and interest under the decree to another, for a valuable consideration, such sale and conveyance is an absolute bar to any appeal from that decree. vi. 573

Where an order directing an issue to be tried in a particular county, is affirmed upon an appeal; the Court below have afterwards no authority to direct the issue to be tried in any other county. vii. 175

On the hearing of all appeals, this principle universally prevails, that no evidence can be received, which was not laid before the court below; nor can any evidence which was received below, be objected to above, unless the admission of improper evidence be among the points of the appeal. vii. 206

It is a known and established rule, that an appeal does not lie against an order made by the consent of parties. vii. 244

Appointment.

A. by will devised his collieries, &c. to trustees, upon trust to convey and dispose of the same in such manner as his daughter *M.* whether sole or covert, should direct or appoint; and for want of such direction and appointment, to apply the money arising thereby to certain purposes in his will mentioned. He then declared, "that though his meaning was to give his said daughter the absolute disposal of the said collieries, &c. to prevent the expences and trouble that must attend the management of affairs of such a nature, under the direction of the Court of Chancery; he requested his said daughter, to direct the money arising therefrom, to be applied in the same manner as he had directed the same, in default of her direction and appointment." The daughter made an appointment in favour of her husband, absolutely. But this appointment was held to be void, as being contrary to the testator's intention. v. 534

A

A G E N E R A L I N D E X.

A woman entitled to the trust of a reversion in fee of lands, reserves to herself, by articles previous to her marriage, a power of disposing of all her estate, to such uses as she shall think proper. She afterwards makes an appointment in favour of her husband and children. This appointment was held good, although no conveyance of the reversion was ever executed to the uses of the articles. *Vol. vi. page 156*

An appointment is made to all and every the daughter and daughters of S. and the heirs of their body and bodies, and in default of such issue, to A. There were only two daughters, and one of them died under 21, and without issue. Held, that the surviving daughter was entitled, though there were no cross remainders between them. *ibid.*

Assets.

Personal assets are the first and immediate fund for the payment of debts. *iii. 290*

An advowson descending to an heir, is real assets, and may be sold for the payment of debts. *iii. 556*

What words in a will are sufficient to make the real estate liable to the payment of debts, in case of a deficiency of personal assets. *iv. 90*

Assignment.

For what reason the assignee of a lease is not compellable in equity, to pay the reserved rent during the continuance of the lease. *i. 30*

Attachment.

The brief of a party in a cause, is clandestinely taken out of the chamber of his attorney, and made an improper use of by the opposite party. The Court ordered the brief to be returned, and granted an attachment, not only against the person who had obtained it, but also against those who had made use of it. *v. 84*

Though a brief is not of itself evidence against the party for whom it is prepared, yet as a discovery of the secrets and merits of his case, may be productive of perjury, or subornation of perjury, and thereby ob-

struct the justice of the court in which the suit is depending; the obtaining it in a surreptitious manner, is an offence highly deserving the censure and punishment of the court. *Vol. v. Page 91*

Avowry.

The commencement of particular estates must be shewn in avowries, and why. *i. 74*

Award.

After a submission of all matters in difference, an award made by an umpire, shall not be set aside upon a suggestion, that he had only particular matters under his consideration. *i. 411*

So where an award, upon a general submission of all matters in dispute, directs particular securities to be delivered up, without taking any notice of two bonds, or ordering mutual releases to be executed; the court will presume that these bonds were under the consideration of the arbitrators, at the time of making their award; and, if they are afterwards put in suit, the plaintiff at law shall pay the costs of such proceedings. *vi. 409*

Bankrupt.

A secret act of bankruptcy committed before the petitioning creditor's debt accrued, will not invalidate the commission sued out by him. *iv. 317*

In what cases a secret act of bankruptcy shall overturn all subsequent conveyances made by the bankrupt, to the prejudice of his just creditors. *iv. 327, note*

Baron and Feme.

Where a wife joins with her husband in a mortgage of her own inheritance, to raise money for his benefit; the husband cannot, by paying off the mortgage, and taking an assignment of the term in trust for himself, devise it for the benefit of his younger children, *i. 1.*

A wife

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A wife being separated from her husband, and having a separate maintenance, may make a gift of her savings, as if she was a feme sole. *Vol. i. page 112*

A covenant that a wife shall be at liberty to dispose of her personal estate, does not extend to what shall come to her after her marriage. *i. 337*

But if she disposes of such *subsequent* personal estate, without her husband's privity, for the benefit of charities; it shall not be made good to him, so as to disappoint the charities. *ibid.*

Where a husband and wife acquire a *joint* interest in a personalty, the husband alone may dispose of it as he pleases. *iv. 168*

Choses in action are assignable by the husband for the benefit of his creditors. *ibid.*

A woman entitled to the trust of a reversion in fee of lands, enters into articles previous to her marriage, whereby it is stipulated, that all her estate shall be conveyed to trustees, in trust for her own use, and subject to her own appointment. The marriage takes effect, and she afterwards executes an appointment, in favour of her husband and children. Held, that this appointment was good, although no conveyance of the reversion was ever executed, nor any fine thereof levied. *vi. 156*

Where a husband by force, &c. compels his wife to execute a deed of separation, and thereby to accept of a very small maintenance, much inferior to his rank and fortune; a Court of Equity will relieve the wife against this deed, and refer it to a Master, to settle a proper maintenance. *vi. 272*

Bills.

There is a proceeding peculiar to the Courts of Equity in *Ireland*, called a *possessory* bill, which is grounded on the equity of the statutes against forcible entries and detainer. This proceeding affecting not the right, but the possession only, it is sufficient, to ground a decree of restitution, to prove a *triennial* possession by virtue of a title still subsisting, though a defeazible one, and a forcible entry and detainer. *vi. 86 and 88. note. vii. 533*

The nature of these bills, and the course of proceedings upon them. *vii. 540. note*

Where a bill is brought to establish a legal title, and for a perpetual injunction, it is the established practice of Courts of Equity, to dismiss the bill, notwithstanding the defendant has answered, and insisted on matter of title. *Vol. vi. page 575*

Bills of Exchange.

In what case the drawer of a bill of exchange, after paying the value of the bill, may, without any previous indorsement from the payee, maintain a special action on the case against the acceptor, for the money so paid. *iv. 604*

The acceptance of a bill of exchange, is not only an undertaking to pay, but an admission of effects sufficient for that purpose. *ibid.*

Bill of Review.

Demurrer to a bill of review allowed, because the decree had been made 27 years. *i. 95*

By the rules of the Court of Chancery relating to bills of review, it is directed, that if the duty decreed be the payment of money, the money must be paid before any bill of review is admitted; though in that case, if the party bringing the bill prevails, the money so paid shall be refunded to him. *ii. 24, note*

The negligence or forgetfulness of persons, under no sort of legal incapacity, and in matters lying within their own knowledge and power, is no sufficient foundation for a bill of review; it being an excuse which might serve at all times, and renders suits endless. *ii. 104*

There are but two sorts of bills of review; one founded on supposed error appearing on the face of the decree itself, the other on new matter which has arisen since the decree, or new proof which could not have been made use of at the time of making the decree. *iv. 465*

But this new proof must be such, as was then not known either to the party, or his attorney, solicitor, or agent. *ibid.*

Where a bill of review is filed for reversing a former decree, and besides specifying errors in the decree, contains *original* matter, and is filed without leave, it ought not to be set aside for irregularity. For under these circumstances, it should be considered as a cross bill. *v. 152*

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Under what circumstances length of time is a good bar to the bringing a bill of review.

Vol. v. page 466

As bills of review occasion great delay and expence, they must be better grounded than upon mere irregularity in point of form, which is no sufficient reason for opening a record. There must be injustice apparent upon the face of the record, and that to a party to the suit; for neither an assignee, or devisee, can have relief by such a bill. vi.

289

Though the plaintiff in a bill of review is confined to error on the face of the record, and cannot go out of it; yet the defendant is at liberty to alledge every matter relevant to his defence, whether in or out of the record, by way of plea, as a release, &c. to prevent disturbing the decree, nor has he any other method of introducing it; and when pleaded, the court is to judge whether the matter alledged is sufficient to preclude the plaintiff from the review he seeks. vi. 306

All the parties to the original bill, must be made parties to a bill of review; it being a principle of natural justice, that none is to be affected without being heard. *ibid.*

Bonds.

In what case bonds taken by a captain of a ship from his seamen, are unjust, and void in law. i. 102.

The obligee in a bond, desires his executor not to trouble the obligor for any part of the bond debt; this amounts in equity to a discharge of the bond, and the Court ordered it to be delivered up to be cancelled iii. 16

How far the agreement of an obligee, that the money due on a bond shall, *after his death*, remain for the use and benefit of the obligor's wife, is waived by the obligee's putting the bond in suit in his lifetime. iii. 576

Books.

The copy right of books is only under the statute of 8 *Ann. c. 19.* whereby the sole right of printing and disposing of copies is vested in the author, or his assigns, for 14 years, from the first publication. But if the author be living at the expiration of that

term, then the right returns to him for another term of 14 years. *Vol. vii. p. 88.*

But this law does not extend to either of the universities of *Oxford* and *Cambridge*, or to the Colleges of *Eton*, *Westminster* and *Winchester*; who have a perpetuity in all copies belonging to them. vii. 110. *note.*

Church.

The word *Prebentation* is a known term in the law, and when spoken of a benefice with cure of souls, imports the patron's presenting his clerk to the ordinary, to be admitted and instituted. ii. 49

Where an archbishop has a right to visit a dean and chapter, the *manner* of his visitation is not so material, as to lay a ground for a prohibition; because any error or defect in the manner of visiting, may be remedied by appeal. ii. 559

Where an incumbent of a living is promoted to a bishoprick, the King by his prerogative has a right to present to the church thus become vacant; but this right must be exercised in the lifetime of the person promoted, otherwise the King's turn is lost. iii. 429. *Note.*

The augmentation of a vicarage, by a yearly payment of corn and money out of the rectory, is a charge upon the rectory impropriate, into whose hands soever it shall come. iv. 537

Before the distribution of parishes, as they are now fixed, the terms *church* and *chapel* were synonymous; and before the year 1285, a *quare impedit* lay for a chapel, as well as a church. A church may be presented to as a chapel and yet remain in right a church; and a chapel may commence a church, by being presented and instituted to as such. vii. 69

Clergy.

Although a benefice is appropriated to a prior, or a dean and chapter, yet the bishop may visit to see how the church is served, &c. and for contumacy, may proceed to suspension *ab officio, et beneficio.* i. 418

A clergyman's living is not an office civil or military, within the statute 2d *Ann.* "to prevent

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“prevent the further growth of popery.”
And therefore, upon the trial of an ejectment brought by a parson for part of his glebe, it was not held incumbent upon the plaintiff to prove, that his lessor had taken the oaths, and received the sacrament, according to the directions of that statute.

Vol. iv. page 281

Where a vicar brings his bill for the arrears of certain annual payments, issuing out of an impropriate rectory, he shall recover against the impropriator, though a considerable time has elapsed between the commencement of the arrears, and the impropriator's possession.

iv. 537

But if, pending such a suit, a man purchases the rectory, with notice of the vicar's claim; he shall only be liable for the arrears which accrue after he comes into possession.

iv. 537

Colleges

Visitors of colleges are not tied up to any particular forms, nor are they to be prohibited for irregularity in their proceedings, or informalities in their acts, but only for want of jurisdiction.

iv. 41

Conditions.

Where a specific legacy is given to *A.* provided he gives no trouble to the executor, the legatee must release all demands upon the testator's estate, before the executor is bound to deliver the legacy.

i. 54

The conditions in a warrant granted for nominating lives to an estate held under the Crown, as part of the duchy of Cornwall, must be strictly complied with, otherwise the warrant is void.

i. 84

A. having several daughters, devises lands in trust for the eldest, in case she should pay 6000 *l.* among her younger sisters, within a limited time; and if not, he gives the like pre-emption to each of his other daughters. The money not being paid within the time, a Court of Equity will not enlarge it.

i. 125

A. held a lectureship upon condition of his diligent preaching once every Sunday, unless by necessity hindered; his absconding for fear of his creditors, is not such a necessity as can

be pleaded in his excuse, to avoid a forfeiture of the lectureship. Vol. ii. page 198

J. S. bequeaths a legacy to *E.* to be paid him within six months after he shall have fully served out his apprenticeship. *E.* runs away, and afterwards dies. His representative is nevertheless entitled to the legacy, with interest from the end of six months after the apprenticeship expired; for the serving out the apprenticeship, is not to be considered as a condition annexed to the legacy, but only as an appointment of the time when it shall be paid.

ii. 347

Where the condition of a bond is entire, and the whole unlawful, it is in most cases void; but where it consists of different parts, some of which are lawful, and others not, it is good for so much as is lawful, and void for the rest.

ii. 381

Equity will not relieve against the breach of a condition precedent, where the damages accrued are contingent, and cannot be estimated.

ii. 430.

A. devised his estate to his son in tail, remainder to *B.* for life, on condition that he took the testator's name, but if he did not, then the estate was given over to *D.* The son died without issue, *B.* performed the condition and died. Held, that *B.* having performed the condition, *D.* took no estate, but that on the death of *B.* it went to the heir at law of *A.*

iii. 486

A. man leaves a legacy to his daughter, on condition that she marries with the consent of a particular person named in the will, otherwise not. The daughter marrying without such consent, is not entitled to the legacy.

iv. 103.

The proviso in a mortgage is, that if the mortgagor fails in payment of the principal money and interest at a limited time, the estate of the mortgagee shall be absolute and indefeasible, both at law and in equity. In this case if default is made, the mortgagee is considered in the light of a conditional purchaser, and no redemption shall be decreed against him.

iv. 142

A. is entitled to a legacy, on condition of her marrying a person of the surname of *S.* She marries a man who assumes the surname of *S.* This is not such a performance of the condition

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condition as will entitle *A.* to her legacy.

Vol. iv. page 194

Lands are devised to *A.* on condition of his settling his own estate to certain uses; if he does not comply with this condition, he shall take no benefit under the will. vi. 232
A. gives to his wife the use of his furniture, &c. at *B.* on condition of her residing there. He afterwards suffers a recovery of the estate at *B.* and dying without making any subsequent disposition, it descends to his heir at law. Held, that the wife was entitled to the bequest, discharged of the condition, which the recovery had put out of her power to perform. vii. 177

Contempt.

On a question whether a defendant could be heard before he had cleared his contempts, though he offered to pay all the plaintiff's demands; he was ordered to bring the principal, interest and costs before the Master, and then be at liberty to move, to discharge the sequestration. ii. 140

Where an order is erroneous, a person ought not to be prosecuted for a contempt in disobeying it. ii. 399

Copyhold.

Where a surrender of a copyhold estate by way of mortgage, becomes void for not being presented in due time; the defect shall be made good against a purchaser *with* notice. i. 244

So where a surrender is left in the hands of the tenant who took it, but never presented it at all. i. 544

Where any dispute arises from a confusion in the boundaries of a copyhold estate, a commission of inquiry ought to be directed, with a previous inspection of all deeds and writings. iii. 180

In what case an issue at law shall and shall not be directed to try the custom of a manor. iii. 269

Corporations.

Where the charter of a corporation directs that the aldermen shall be chosen *annually*, this is only a directory clause, and does not

determine the office of alderman at the end of the year after his election. *Vol. iii. p. 167*

And where a charter directs, that the mayor shall continue in office until another is duly elected and *sworn*, the successor, though duly elected, cannot act until he is sworn; and if he does, judgment of ouster may be given against him. iii. 173

A corporation being empowered by their charter to elect a schoolmaster, must, in every particular relative to that appointment, adhere strictly to the *tenor* of the charter; and upon their neglecting so to do, are liable to costs. iii. 241

Where the acceptance of a new charter, will determine an ancient usage in the corporation. iii. 428

No bye-law of a corporation must, be repugnant to the charter, such repugnancy making it void. iv. 454.

The non-residence of a free burgess within the borough, is not a sufficient ground for an information in the nature of a *quo warranto*, against such free burgess, without a previous motion, or some other proceeding previously had against him for such non-residence. v. 287

In *Hilary* Term 1686, an information in the nature of a *quo warranto*, was brought in the Court of Exchequer in *Ireland*, against the corporation of *Drogheda*; and in *Easter* Term following, judgment was given against them, and their liberties, &c. were seized into the King's hands. Held, that this information would not lie in that Court, and that therefore the judgment was void. v. 369

In consequence of that judgment, King *James II.* created a new corporation by charter, who made a reversionary lease to *J. S.* of some lands belonging to the old corporation. This charter being declared void by an act, 1. *William and Mary*, sess. 2. c. 9. the lease is void also. *ibid.*

Where the power of electing burgesses and freemen of a borough, is by charter expressly given to the mayor and commonalty, together with the aldermen; a subsequent bye-law, giving this power to the mayor and aldermen only, is illegal, and void in its creation. vi. 511

All

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All the bye-laws made by corporations, must be consistent with, and subordinate to their constitution by their charter; for if they could make bye-laws to alter their own constitution, the King's prerogative would be taken away, and transferred to the subject. *Vol. vi. page 519*

Costs.

Where the trustees of a charity are guilty of neglect and mismanagement, they shall make good the deficiency, and answer the costs of the suit. *i. 9*

So, where executors make an unfair appraisement, and otherwise misbehave themselves in their trust. *i. 115*

If a creditor by judgment recovered, is afterwards found guilty of fraud respecting his whole demand, he shall pay costs, both at law and in equity. *i. 261*

Where a testator by his own conduct, makes it necessary for his devisee to file a bill for the establishment of his will, and the will is set aside, as having been revoked by a subsequent conveyance; such bill ought not to be dismissed *with costs*. *i. 387*

In what case a corporation, being trustees of a charity, are liable to costs. *i. 399*

Costs generally follow the event of an account, but where the account is intricate or doubtful, there ought to be no costs. *i. 550*

A decree for costs, necessarily follows a decree for payment of the principal and interest. *ii. 72*

Costs ought not to be decreed against an executor, though, by putting a bond in suit against a debtor, he acts against the *express* desire of his testator. *iii. 16*

In an information in the nature of a *quo warranto*, the defendant is not liable to costs. *iii. 178*

Where the defendant will not admit a *general* right, but puts the plaintiff to the trouble and expence of proving it, he shall pay the costs of the suit. *iii. 203*

Although a jury find only six-pence damages, and sixpence costs, yet the party prevailing shall have his costs, to be taxed. *iii. 222*

Where a creditor of a testator brings his bill for a sale of the testator's estate, under an apprehension that the same is well charged with the payment of his debts, and upon an ejectment the will is set aside; the creditor's bill ought not to be dismissed *with costs*. *Vol. iii. page 233*

A corporation nominating a schoolmaster, contrary to the particular tenor of their charter, are liable to costs. *iii. 241*

Where in a suit for tithes, the plaintiff's demand is no more than 9 s. yet this will entitle him to his costs. *iv. 314*

Courts.

The Court of *Hustings* in *London*, is the only Court where a writ of error of a judgment given in the Sheriff's Court, lies. *i. 216*

The Lord Mayor of *London* is not the sole judge of the Court of *Hustings*, for by the constitution of this Court, it may be held by six Aldermen in his absence. *ibid.*

The Court of Chancery will not, in matters executory, where the words of articles, or of a will, are improper or informal, direct a conveyance according to such improper or informal expressions; but will order it to be made in a proper and legal manner, so as may best answer the intent of the parties. *i. 291*

Covenants.

In a lease of lands renewable for ever, the lessee covenants, that he and his heirs shall with all their family live on the demised premises, during the continuance of that and every other lease; and that whenever he or they shall fail so to do, an additional rent shall become payable, with the usual remedies of distress and entry, to compel the payment thereof. The reasonableness of this covenant is properly triable at law, and a Court of Equity ought not to interpose, or give relief against it. *vi. 417*

A lessee covenants not to plough up any of the ancient meadow or pasture ground, and if he does, to pay an additional yearly rent of 5 l. an acre. This increased rent is not to be considered as a penalty, but as a liquidated satisfaction,

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satisfaction, fixed and agreed upon by the parties. And therefore, upon an action brought for recovering it, a Court of Equity ought not to interpose, or give any relief.

Vol. vi. page 470

Customs.

A large common extends itself into several parishes, and by custom, the owners of the cattle fed upon this common, pay tithes of such feeding to the parson of the parish in which they respectively live, and not to the parson of that parish in which the cattle occasionally feed. This is a good custom.

i. 278

Where customs are uncertain, unreasonable, or not warranted by the rules of law, no issue ought to be directed by a Court of Equity, for trying the existence of them.

iii. 269

Tithes of fish are payable only by custom, and cannot be claimed as a mere personal tithe, *deductis expensis*.

iii. 479

By the custom of several manors in the counties of *Cumberland* and *Westmoreland*, a general fine becomes payable upon the death of the Lord; this is a good custom, even where the manor has been alienated by the Lord in his lifetime.

iv. 204

Custom of London.

In what case the children of a freeman of *London*, are entitled to their full share of the orphanage part of his estate, without bringing a previous advancement into hotchpot.

i. 254

The common council of the city of *London*, have no cognizance of any matters touching their election; but by the immemorial custom of the city, the cognizance and examination of such elections, belongs to the King's Court of Record, held before the Lord Mayor and Aldermen.

ii. 98

A personal undertaking in the Court of Aldermen, to become a freeman of the city of *London*, within a limited time, is equivalent to a covenant in writing for the same purpose.

iv. 7

Debtor and Creditor.

Creditors who recover against an executor in a Court of Equity, shall be preferred to those who afterwards obtain judgments at law.

Vol. iv. page 287

Decree.

By the constant and established rules of the Court of Chancery in *Ireland*, the draft of a decree ought to be delivered to the adverse party, or his attorney; who in eight days is to return the same, signed by the counsel on that side, or make objections to the draft, before it can regularly be inrolled.

ii. 234

Such defects in a decree, as the court will rectify on motion, are not sufficient grounds for an appeal.

ii. 314

Upon a bill, in the nature of a bill of revivor against a devisee, the defendant cannot dispute the justice or validity of the former decree.

ii. 523

The decree of a Court of Equity, is equal to a judgment at law; and where an executor in obedience to a decree, pays away assets to some creditors, and other creditors afterwards obtain judgments against him, to which he cannot plead the decree; the Court will protect him in paying obedience to it.

iv. 287

Under what circumstances, a decree obtained upon process of contempt, may be set aside.

iv. 546

In what case a party cannot complain of a decree, by way of appeal.

iv. 583

The Register's minutes of a decree, dismissing a bill, are not pleadable in bar to another suit brought for the same matter; for minutes are but evidence of the judgment of the Court, and the ground work of the decree, but are by no means conclusive; being sometimes mistaken by the officer, and often rectified and varied by the Court, upon a summary application.

vi. 73

Where it does not appear by the register's minutes, that any evidence was read at the hearing of the cause, the Court ought not upon a subsequent application, to make an order, that the evidence should be entered as read.

vii. 204

A.

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Demurrer.

A. subscribes 1000 *l.* into the third subscription of the *South Sea Company*, and their cashier gives a receipt for the money. By mistake of the clerk, the Christian name of another person is inserted in the books instead of *A.* *A.* brings his action against the Company, for the money paid, and on their filing a bill in Equity for relief, *A.* demurred generally for want of equity. Demurrer allowed. Vol. ii. page 442

A will of personal estate was proved in the Spiritual Court; but the executor of a former will brought a bill in equity, to discover by what means the latter will was obtained, and whether the testator was not incapable or imposed upon, and to have an account of the personal estate. To this bill the defendant demurred, because it belongs to the Spiritual Court only to determine upon the validity of wills of personal estate, and the sanity or insanity of the testator. Demurrer over-ruled. ii. 476

A. brings his bill for a satisfaction of tithes as lessee, defendant demurs, for that the plaintiff did not set forth how his lessor become entitled. Demurrer over-ruled. ii. 514

Demurrer to a bill, requiring the defendant to set forth a case with counsel's opinion, for that the plaintiff was not entitled to any such discovery, the opinion being taken for the defendant's own private use and satisfaction. Demurrer over-ruled. iii. 538

An information is filed by the Attorney General against *A.* and *B.* for a discovery of the place of their birth, charging them to be aliens. The defendants demur, 1st, That the king's title to the estate, if any, was merely at law, without any circumstance or ingredient to entitle him to the assistance of a Court of Equity. 2d, That the defendants were not bound to betray their own title, and therefore the king was not entitled to the discovery prayed. Demurrer over-ruled. v. 91

To a bill brought for setting aside a lease, the defendant demurred, because it appeared of the plaintiff's own shewing, that the validity of the lease was a question properly determinable at law. Demurrer allowed.

Deposit.

Where a deposit is made as a collateral security for the payment of a debt, and the creditor sells the deposit before the debt becomes payable; he shall answer for the value of the deposit, with interest and costs.

Vol. iii. page 142

Devise.

Where a testator directs lands to be purchased for the benefit of his nephew *W.* for his life, but makes no further disposition, the lands after the death of *W.* will belong to the testator's heir at law. i. 43

Lands are devised to *A.* charged with a portion of 500 *l.* but part of them are intailed by an ancient deed; the intailed lands are not liable to this portion. i. 61

A. devises a chattel interest to his executor, that out of the profits, his daughter may receive the interest of 2000 *l.* and that the principal may be raised out of the surplus profits. The executor mortgages this estate for 1800 *l.* Held, that the 2000 *l.* and interest must be first raised. i. 71

In what case a devise of a real estate to *B.* without adding any words of inheritance, will pass the fee. i. 108

A. devised his personal estate to his wife, she maintaining his four younger children; but if she married, she was to enjoy but one half, and the younger children were to have the remainder. The wife did maintain the children, and did not marry. Held, that she was entitled to the whole estate so devised. i. 129

In what case a lease of lands made subsequent to a devise of the same lands, will revoke the devise. i. 160

J. S. conveyed his real estate to trustees, for the purpose of paying his debts and legacies, and by will gave all his personal estate to his wife; and made her executrix. In this case, the security upon the lands does not discharge the personal estate, but the same still continues liable, and ought to be taken in aid of the real estate. i. 192

A devise of *all my lands, &c. which I shall be possessed of at the time of my death*, will not pass such lands as the testator purchased subsequent to the making of his will, unless the will is republished after the purchase. i. 199

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An estate in mortgage is devised to *A.* and several legacies given to others, the mortgage must be first satisfied out of the personal estate; and if that falls short, the legatees must abate in proportion. *V. i. p. 210*

A devise of lands *out of settlement*, will pass as well those lands of which the testator was seised in fee at the time of making his will, as those which were comprised in a settlement made on his marriage, the particular uses of which were determined, by his having no male issue. *i. 229*

In what case a Court of Equity, in directing a conveyance by way of settlement of a devised estate, will order a limitation to trustees to preserve, &c. to be inserted. *i. 288*

In what case parol evidence of a testator's intention, respecting the surplus of his personal estate is admissible, where he omits to make any disposition of it by his will. *i. 305*

A. devised the residue of his real and personal estate to his executor, in trust to sell the same, or so much as should be needful for the payment of his debts and legacies. This was held to be intended as a beneficial devise to the executor; and parol evidence was admitted to prove such intention. *i. 324*

So, where an executor had a legacy given him, and no disposition was made of the surplus; parol evidence was admitted to prove the testator's intention, that the executor should have it. *i. 340*

A. devised to his wife a rent charge of 200 *l.* for 13 years, in trust for the payment of his debts and legacies; the surplus of this rent charge, after debts and legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir. *i. 372*

Devise of lands to *H.* and *W.* and if either of them die without heirs of their own bodies, the share of him so dying to go to *C.* *W.* died without issue. *H.* and *C.* are entitled in equal moieties. *i. 457*

In what case an executor shall be entitled to the surplus even of a *real* estate, and that there is no resulting trust for the benefit of the heir. *i. 478*

Devise of lands to the heirs male of *E. L.* lawfully begotten, and in default of such

issue, to the testator's own right heirs. *E. L.* was *living* at the time of his death. But upon a question between the testator's heir at law, and the eldest son of *E. L.* it was held, that the eldest son should take. *Vol. i. page 489*

Lands are devised *after such time as my debts and legacies shall be fully paid by the rents and profits thereof*, to *E.* for life, with remainder to his issue male, remainders over. *E.* entered, and kept down the interest of the debts, and afterwards suffered a recovery, and declared the uses to himself in fee. Held, that an estate for life was vested in *E.* at the time of the recovery, *although the debts were not paid*, and that *E.* could make a good tenant to the precipe. *ii. 1*

J. S. being seised of some lands in fee, and *cestui que trust* of others, devises them all to *A.* for life, with remainder to his first and second son in tail male (going no farther) and after *A.*'s death, without issue male, to a charity. Held, that *A.* was tenant in tail until issue born, save as to the trust estate. *ii. 382*

A. devised to her daughter *E.* *my strong box and whatsoever is in it, and all my chests and cabinets, and whatsoever is in them.* This strong box was fixed upon a frame containing several drawers, and in those drawers were found bank notes, and other things of value. Held, that the whole passed by the devise. *iii. 36*

A devise of lands to trustees, who are afterwards changed by a codicil, is not revoked by the codicil; but the new trustees shall stand seised upon the trusts of the will, although the word *heirs* is not made use of in the codicil. *iii. 107*

Where the devisee of lands, with remainder to the heirs of his body, dies in the lifetime of the testator, the devise becomes void. *iii. 161*

A. devises real and personal estate to *B.* for life, with remainder to the heirs of his body; the limitation over is void, as to the personal estate, and *B.* shall take it absolutely. *iii. 257*

Lands are devised *to be settled on A. and B. and the survivor of them and their heirs, equally to be*

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be divided between them, share and share alike.

A. died in the testator's lifetime; and the question was, Whether his moiety should descend to the heir at law of the testator, as a lapsed devise, or should go to *B.* the surviving devisee? Held, that the first part of the devise made *A.* and *B.* plainly joint tenants, and therefore *B.* by survivorship, became entitled to the whole for life; but that the inheritance being devised to them as tenants in common, one moiety lapsed by *A.*'s death, in the testator's lifetime, and shall go to the testator's heir at law, and the other moiety shall go to the heir of *B.*

Vol. iii. page 297

In what case the devise over of a personal estate, on failure of issue of the first devisee, may be good. iii. 383

Where there is a trust estate in the ancestor, and a use executed in the heirs of his body, these different interests cannot unite so as to give the ancestor an estate tail, by operation of law. iii. 458

A devise to one, with a limitation over to another, if the first devisee dies without issue, creates, by construction of law, an estate tail in the first devisee. iii. 467

A. devised his estate to his son in tail, with remainder to *B.* for life, on condition that he should change his name; and if he did not, then the estate was given over to *D.* The son died without issue. *B.* performed the condition, and died. In this case, *D.* took no estate on the death of *B.* but it went to the heir at law of the testator. iii. 486

In what case a particular estate, expressly given, shall not be altered by any implication from subsequent words. iii. 528

What words will amount to a good charge upon a testator's real estate, for such debts as his personal estate is insufficient to pay. iv. 90

Devise of lands on failure of issue of the body of *B.* and for want of heirs male of the testator's own body, to his daughter *F.* and the heirs of her body, does not give *B.* an estate tail by implication; and the devise to *F.* is executory and void, as being on too remote a contingency iv. 96

Lands are devised to *A.* chargeable with a le-

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gacy to *M.* upon the contingency of his dying without issue male. The legatee died before the contingency happened, but her personal representative is entitled to the legacy. *Vol. iv. page 228*

Devise of lands to three several persons for life successively, with remainder to their first and other sons, remainders over. The remainders over are void, as tending to a perpetuity. iv. 244

A. devised all his real estate to his son *B.* and his issue, with remainders over; and directed the residue of his personal estate to be laid out in land, and settled to the same uses. *B.* died without issue, before the residue was laid out. His executor is not entitled to it, but it shall be invested in the purchase of lands, according to the will. iv. 263

A. by will gives all his real and personal estate to trustees, in trust for the payment of his debts and legacies; and then to the use of his eldest son *J.* and his heirs forever: And failing issue of *J.* then to the use of his second son *L.* and his heirs forever: And failing issue of that son, to his third son *G.* and his heirs forever: And failing issue of that son, then to the use of every other son that I shall or may have, and their heirs forever: And failing my issue male, then to the use of my issue female, and their heirs forever. Held, that according to the intention of the testator, his sons took successively an estate in tail male; and that upon the death of the eldest son, leaving only a daughter, the second son took in the order of succession. v. 14

Where a testator making provision for the different branches of his family, gives a fee simple estate to one, and a settled estate to another, imagining that he had power so to do; a tacit condition is implied to be annexed to the devise of the fee simple estate, that the devisee thereof shall permit the settled estate to go according to the will; and if in that respect he should disappoint the will, what is devised to him, shall go to the person so disappointed. It being presumed, that if the testator had known his defect of power to devise the settled estate, he would, out of the estate in his power, have provided for that branch of his family who

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was

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was not entitled to the settled estate; and have declared, that no person should enjoy a legacy or devise, who controverted his power as to any benefit given to another.

Vol. v. page 165

Where a father disposing of his estate, happens to give a younger son, what was settled upon the elder, and at the same time gives the elder son some other provision; if the elder will defeat the will in any part, he shall not at the same time take any benefit under it.

v. 180. note.

Devise to *L. H.* for his natural life, and no longer, provided he takes the name of *R.* and after his decease, to such son as he shall have, lawfully to be begotten; and for default of such issue, to *W.* and his heirs for ever. Held, that upon the true construction of the will, and to effectuate the manifest general intent of the testator, *L. H.* must be construed to take an estate in tail male.

v. 278

A. devises 30,000*l.* *South Sea* annuities to trustees, in trust to pay the dividends to *J. S.* until an exchange of certain lands shall be made between him and *W.* and then the capital to be equally divided between them. *W.* dies before the time limited by the will for making the exchange expires. Held, that *J. S.* is absolutely entitled to the whole legacy.

v. 349

J. S. devised lands to his son *M.* and other lands to his son *J.* and in case both of them should die unmarried, and without lawful issue, then his three daughters were to have the lands as tenants in common, and not as joint tenants. Both the sons died unmarried, and without issue; and two of the daughters died in the lifetime of the surviving son, leaving issue. Held, that the three daughters had such a contingent interest vested in them upon their father's death, as was transmissible to their representatives, and that the surviving daughter was not entitled to the whole.

v. 388

Where a testator devises a leasehold for years to one for life (who has no children), with remainder to his first and other sons in tail male; remainder to another for life, and

to his first and other sons in tail male; with several remainders over; if the second tenant for life has a son born, before the first tenant for life has a son, the remainder in tail limited to that son will vest; and all the subsequent remainders which were good as possibilities, while the contingency of a nearer heir's coming *in esse* were in suspense, are *ipso facto* from that moment determined. And though such tenant in tail should die an infant, the next day after his birth, yet the ownership of the term must vest, and his administrator must take it; subject only to be defeated by the birth of a son of the first tenant for life, who will still be prior to such intestate infant in the order of limitation.

Vol. v. page 435

A. being seised of the reversion in fee of a settled estate, and of other estates in fee simple in possession, makes his will, and thereby devises several described estates to his wife and her heirs; and adds, *all other my lands, tenements and hereditaments.* These words, however forcible *ex vi termini*, to carry the reversion of the settled estate, will not so operate, where a contrary intent appears clearly upon the face of the will.

v. 496

J. S. devises his real estates to trustees, in trust for several persons for life, with remainders to their first and other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male. Held, that this clause of revocation and resettlement was void and of no effect, as tending to a perpetuity, and repugnant to the estate limited.

v. 592

A. by will gives the residue of his estate to three of his children, share and share alike, as tenants in common, and not as joint tenants. But, by a codicil, he revoked his daughter *M.* from being one of his residuary legatees, and in lieu thereof gave her a pecuniary legacy. This third shall go to the testator's next of kin, and does not belong

long

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long to the two other residuary legatees, as such. Vol. vi. page 1

J. S. gives the residue of his estate to his daughter *C.* to dispose of as she shall think fit; but if she should die unmarried or intestate, then what was left to her should go to his brother's children. *C.* possessed this residue, and disposed of it in making purchases, and taking securities in her own name. She afterwards died intestate and unmarried. Held, that all her personal estate belonged to her next of kin; and that no part of it could be considered as the specific personal estate of her father, or go to his brother's children. vi. 36

A devise to *A.* and *B.* and their heirs, in default of issue male and female of the testator's own body, is at the testator's death a devise in possession, and not an executory devise; the contingency being determined at the instant the will takes place, viz. at the death of the testator without issue. vi. 58

A man by will gives to his executor an annuity of 200 *l.* and charges his real estate with the payment of it. The testator by a codicil, attested by two witnesses only, gives his executor another annuity of 100 *l.* payable as mentioned in my will. Held, that the executor was well entitled to both the annuities; but that the annuity given by the codicil, was payable out of the personal estate. vi. 156

Devise to *W.* the first son of the testator's brother *R.* for life, remainder to the first and other sons of *W.* in tail male, remainder to the second son of *R.* for life, remainder to the first son of such second son, and to the heirs male of the body of such second son, remainders over. The first son of *R.* died without issue male; whereupon the second son entered and suffered a recovery. Held, that the second son took an estate tail under the testator's will. vi. 222

Where a man has an estate for life devised to him, even with the negative words of *no more*, or *no longer*, or the like, yet if there is a subsequent devise in the same will to his heirs, or the heirs of his body, these latter words are to be construed as words of limitation, and not of purchase; and will operate by force of the testator's general intention

against his words, and give an estate in fee, or in tail, to the ancestor, and not to the heir. Vol. vi. page 227

R. devises all his real estates to his son *J.* for life, on condition that he should, in twelve months after the testator's death, suffer a recovery of his own estate, and settle it to certain uses mentioned in his father's will; but if he should neglect or refuse so to do, then the testator declared, that the devise of his real estate to his said son *J.* should cease and be void; and in that case, the same should go according to the uses before limited, in the same manner as if his said son was really dead. *J.* suffered a recovery of his own estate, but declared the same to other uses than those mentioned in his father's will. He nevertheless continued in the possession of the devised estate. But it was held, that not having complied with the condition, he was not entitled to any benefit or advantage under the will. vi. 232

And should account for the rents and profits of the devised estate, so long as he had continued in the possession of it. vii. 303

A. devises an Exchequer annuity of 1000 *l.* to trustees, in trust for his grandson *John*, for so many years as he should live; and from and after his decease, for such person as at the time of his death should be the heir male of his body, and in case there should be no such person, then in trust for such person as should be the heir male of the body of the testator's son *John*. The grandson *John* died an infant, and without issue; and about four years afterwards, the testator's son *John* had another son born, named *George*, who also died an infant, and without issue. Held, that the absolute property of this annuity, vested in *George*, and that upon his death, it belonged to his father as his administrator. vi. 232

J. S. gives all his personal estate to trustees, in trust to pay the interest thereof to his wife, so long as she should continue his widow; but if she married again, then he directed his trustees to pay her an annuity of 110 *l.* and no more, during her life; and in that case, he gave the residue of his estate to his son *P.* but made no disposition thereof in the event of his wife's not marrying again.

The

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The wife did not marry; and upon a question to whom this residue belonged, the Court held, that it belonged to the representatives of the son, who had attained 21, and died in his mother's lifetime. *V. vi. p. 260*

A. gives all his worldly substance to his daughter *J.* provided she marries with the consent of his executors; but if she should marry without such consent, or should *die without issue*, then he gives his estate to other persons. The daughter married with consent, but died without ever having had any issue. Upon a question, when this bequest over took effect, it was held to take effect upon the death of the daughter, without issue living at that time. *vi. 309*

So, where a man gives his estate to his wife, so long as she shall remain unmarried, but if she marries, then to his daughter, and in case the daughter should die without leaving issue, then to *J. S.* The daughter died without issue in the mother's lifetime, who still remained a widow. Held, that the reversionary interest belonged to *J. S.* upon the death of the daughter, without issue *then* living. *vi. 354*

But where a woman having a power of appointing 3000*l.* executes her power, and appoints that sum to be paid to certain persons, upon the death of her son without issue; the Court held this to be a general failure of issue, and that therefore the contingency was too remote. *vi. 420*

A. by will gives his Bank stock, Exchequer orders, and other parts of his personal estate to *B.* for life, and after her decease, to the heirs male of her body lawfully begotten for ever; and for want of such issue, to *C.* for life, and if he marries and has issue, to his heirs male lawfully begotten for ever. Held, that *B.* took the absolute interest, and that the devise over to *C.* was void. *vi. 450*

Where the words of a will give an express estate tail in a freehold, the same words applied to personal estate, will give the whole interest; for otherwise it would create a perpetuity, which the law abhors; inasmuch as no recovery can be suffered of, or affect personal property. *vi. 456*

L. M. gave 4000*l.* Bank stock to trustees, in trust to pay the dividends to his daughter *E.* for life, and after her death, he directed the principal to be divided equally between her children, at their ages of 21, or marriage; but if they should die before, then to his son *L.* The daughter had two children who both attained 21, but one of them died in her lifetime. Held that this legacy did not vest absolutely in the children of *E.* on their attaining 21, but only in such of them as should be living at the time of her death. *Vol. vi. page 559*

A. devises lands to his eldest son for life, remainder to the heirs male of his body lawfully begotten; remainder to the youngest son in like manner; remainder to any after born son of the testator's for life, remainder to the heirs male of the body of such after born son; and for want of such issue, to his brother *T.* for life, with remainder to the heirs male of his body. The testator was on his death bed at the time of making his will, and died in about three weeks afterwards. The youngest son however died before him, and the eldest enjoyed the estate, but died without issue, and without having barred the entail. Upon a question, whether the limitation over to the testator's brother, ought not to be considered as depending upon a general failure of issue, and consequently too remote; it was held, that a remainder after estates tail was vested in the brother, and that the testator had not the event of a second marriage in his contemplation. *vii. 130*

A man devises the use of his furniture, &c. at *B.* to his wife for life, on condition of her residing there. He afterwards suffers a recovery of the estate at *B.* and dying without republishing his will, the estate descends to his heir at law. Held, that the wife was entitled to the use of the furniture, &c. discharged of the condition, which the recovery had put out of her power to perform. *vii. 177*

J. S. gives the residue of his estate to his daughter *E.* for life, and after her death, to be equally divided among her children, when the youngest should attain 21. But if his daughter should die without any child, or

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or the youngest should not arrive to 21, and none of them should have left lawful issue, then he gave the residue to other persons. *E.* had only one daughter, who married and had four children, but both she and all the children died in the lifetime of *E.* Held, that upon the death of *E.* without any child then living, the devise over took effect. *Vol. vii. page 223*

Devise to *A.* as soon as he shall accomplish his full age of 21 years. *A.* was born on the 16th of *August* 1725, and died on the 15th of *August* 1746. Held, that he lived to attain his full age of 21. *vii. 235*

J. S. devises to his wife and her heirs, all his manors, messuages, *advowsons*, &c. in the county of *H.* for the purchase whereof he had already contracted and agreed. The testator had two *adovsons* in that county, one of which he had not only contracted for, but it had been actually conveyed to him, prior to the making of his will. Held, that this *advowson* was well devised; for otherwise the word *advowsons*, in the plural number, would have no effect. *vii. 353*

A. gave and bequeathed to his mother, all the remainder and residue of all the effects both real and personal, which he should die possessed of. Held, that the word *effects*, as used in this will, was sufficient to carry the inheritance of the testator's real estate. *vii. 467.*

Discovery.

Persons claiming lands by a will, or other voluntary disposition, and having the law on their side, are entitled, as against an heir at law, to the assistance of a Court of Equity, for a discovery of the deeds and writings relating to the devised estate, and to have them delivered up, as following the lands. *i. 397*

The known method of recovering estates held by aliens, for the benefit of the Crown, is by a commission under the Great Seal, to enquire into the facts; and on the inquest finding them, to seize the estate into the King's hands. And in order to prove these facts, the King has the same right to a discovery, by the assistance of a Court of E-

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quity, as the subject has, and founded on the same principle of justice; *viz.* that it is in general against conscience, for any one to enjoy the property of another, by concealing his right. *Vol. v. page 97*

Dissenters.

A freeman of the city of *London* is elected one of the sheriffs, but refusing to take the office on account of his being a dissenter, and as such, not having received the sacrament according to the rites of the church of *England*, within a year before his election; an action is brought against him for the penalty incurred by such refusal, and a judgment recovered. The action being brought in the Sheriff's Court, a writ of error was brought in the Court of Hustings, where the judgment was affirmed. But the defendant having obtained a special commission of errors, the judges delegates reversed both the judgments; and on a writ of error in Parliament, this judgment of reversal was affirmed. *vi. 181*

Dower.

A jointure settled on a wife, by articles previous to the marriage, but to which she was no party, will not bar her of dower. *i. 538*
Where a man devises a moiety of his estate, after payment of debts, legacies, and portions, to his wife for life, this will not bar her of dower; but she must elect, whether she will insist on dower, or waive it, and take under the will, for she cannot do both. *ibid.*

But where there does not appear to be a clear intention in the testator to bar his wife of dower, she shall not even be put to her election; but shall have her dower, as well as the provisions made for her by the will. *i. 591*

By an *Irish* statute, 6 *Ann.* a woman by subtil means, or secret insinuations and delusions, threats, or menaces, prevailing on the son and heir apparent of any person, having lands of the yearly value of 50*l.* or personal estate of the value of 500*l.* to marry her; is rendered incapable of demanding any dower or thirds, or other interest, out of the

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the real or personal estate of her husband. But this being in the nature of a penal statute, must be construed strictly; and therefore, where it is pleaded to a writ of dower, the jury must expressly find, that subtil means, &c. were used, for they are not to be presumed from circumstances. *Vol. iv. page 362*

A woman married under the age of 21, having before such marriage a jointure made to her in bar of dower, is thereby bound, and barred of dower, within the statute 27 *Hen. VIII. c. 10.* v. 570

Dower, though a just and honourable provision for the wife, is a right inconvenient to the heir, preventive of the free use and improvement of his lands, and in great estates, a far more ample provision than can be reasonably demanded or expected. The legislature therefore, in passing the act 27 *Hen. VIII.* intended, that all women capable of contracting marriage, should be bound by jointures made before marriage, which are presumed to be settled by the advice of parents, guardians and friends; or if made only by the husband, with their own consent, fairly and without fraud, still it was thought reasonable, that she whom the law allowed to bind herself by the marriage, which is the principal contract, should be bound by a provision which is accessory to that contract, and a condition of it. v. 577

Error.

NO writ of error lies to Parliament, for a refusal of the Court of *B. R.* to grant a peremptory writ of *mandamus.* iii. 178

A writ of error was brought in *B. R.* in the lifetime of King *Geo. I.* but was not argued till after the accession of King *Geo. II.* when the judgment was affirmed. On a writ of error in Parliament, this judgment was reversed; it being held, that the first writ of error (the King being the sole plaintiff in the cause) was absolutely abated. iii. 418

A writ of error in Parliament from a judgment of any of the courts of law in *Ireland,* will not lie, unless the record first passes through

the Court of King's Bench in *England.* *Vol. iv. page 366*

2. if this practice is not altered by the repeal of 6 *Geo. I. c. 5?*

Error does not lie for the misfinding of a verdict by a jury, but in such case, the proper remedy is by application to the Court in which the action is brought, for a new trial. vii. 48

Evidence.

Depositions taken in a former cause, where neither the present plaintiff or defendant were parties, cannot be read as evidence; but if either of them was a party in the former cause, the depositions in that cause may be read against such of them as was a party. i. 11. *Sed vide* iv. 157

The *abstract* of a deed is no evidence; and much less an *attested copy* of such *abstract.* *ibid.*

No evidence can be given on the hearing of an appeal in the House of Lords, which was not read, or insisted on, in the Court below. i. 70. *Sed vide* 590.

A draft of articles of partnership, with an account stated, and the payment of money by the acting partner to the others, are altogether sufficient evidence of the partnership, whereon to ground a decree for an account. i. 196

In what case a subscribing witness to a will, to whom the testator was indebted at the time of his death, is a competent evidence to prove such will. i. 253

Copies of a note, bill of sale, and stated account, if attended with circumstances of undeniable credit, will be admitted as evidence. i. 261

Particeps criminis, in the case of fraud, is the most proper person to discover and prove it; and especially, when what he so proves turns to his own prejudice. i. 273

Where the surplus of a testator's personal estate is not disposed of by his will, parol evidence is admissible to shew an intention of giving it to his executor; it being only to rebut an equity, arising by implication in favour of the next of kin. i. 305, 324

In

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In what case old rent rolls are admissible evidence to prove fee-farm rents. *Vol. i. page 367*

But an inquisition *post mortem* is not evidence, unless it is proved that a commission issued to warrant it. *ibid. Sed vide iii. 208*

After a decree of foreclosure is made absolute, and an acquiescence of eleven years in the mortgagee's possession under it; no parol evidence of his promising to account and reconvey on payment of his money, can be admitted. *i. 414*

The deposition of a person concerned in interest cannot be read. *i. 590. Sed vide 253.*

A decree between other parties, may be read as a *precedent*, but not as evidence. *ii. 31. Sed vide iv. 33*

Letters of the hand writing of a party, are sufficient evidence of a trust, so as to take the case out of the statute of frauds. *ii. 39.*

A decree in a former cause is no evidence against a party in the cause, who was not brought to hearing. *ii. 56*

The entries of the names and titles of persons in a church book, either of marriages or births, is not positive evidence of the marriage or birth of any person; unless the identity of the persons named in such entries is fully proved, and strengthened also with circumstances of cohabitation, or the allowance of the parties. *ii. 92*

Where an original will is lost, and from the exemplification thereof, under seal of the Prerogative Court, there is reason to suspect its validity, as to the disposition of the real estate; such exemplification cannot be admitted as evidence, but the party claiming must be left to his remedy at law. *ii. 143*

Parol proof of a testator's directing his executor *not to trouble A. for a bond debt*, is sufficient to ground a decree against the executor, to deliver up the bond to be cancelled. *iii. 16*

The entries of a statute staple, and a defeazance thereon, in the book of the proper officer, is good evidence, where the originals are not to be found. *iii. 28*

But an attested copy of an entry in the office of the Chamberlain of London, that *A.* was

admitted to the freedom of the city, is not, after his death, sufficient evidence to prove him a freeman, without proving the identity of his person. *Vol. iii. p. 47*

A plaintiff after publication files a supplemental bill, and examines witnesses to prove matters which were in issue in the original cause; this is irregular, and the supplemental bill must be dismissed. *iii. 51*

In what case written evidence, not insisted on in any of the pleadings, ought not to be regarded at the hearing; especially where it is of suspicious appearance. *iii. 93*

The refusing a party liberty to prove exhibits, *viva voce*, at the hearing of a cause in a Court of Equity, is irregular and unprecedented. *iii. 119*

An old inquisition *post mortem*, may be read as evidence, without producing the commission upon which it issued; but it is necessary to prove that such a commission did actually issue, which may be done, *viva voce*. *iii. 208. Sed vide ii. 367*

Affidavits in support of evidence given on the trial of an issue directed by the Court of Chancery, may be read upon an appeal from a decree of that Court. *iii. 214*

But no proofs can be read on the rehearing of a cause, which were not read on the original hearing. *iii. 231*

Parol evidence cannot be admitted to explain the words of a will. *iii. 257*

Courts of Equity will not permit an examination of witnesses, *in perpetuam rei memoriam*, to defeat the title of a purchaser for a valuable consideration, without notice. *iii. 473*

The producing a receipt for interest within 20 years, indorsed on a bond by the obligee, is sufficient to take off the presumption of payment; though no proof be given when such receipt was written and signed. *iii. 535*

A decree of the Court of Chancery, determining a matter of right, is good evidence of that right, as to all persons claiming under the party against whom the decree was made, though at the distance of 100 years afterwards. *iv. 33*

Depositions of witnesses taken in former causes, relating to the same matter for which

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which a new suit is instituted against another party, ought to be permitted to be read as evidence, on the hearing of such new cause; although the witnesses themselves are not proved to be dead. *Vol. iv. page 157. Sed vide. i. 11.*

Where one man is indebted to another by bond, and the obligee makes the obligor one of his executors and residuary legatees, without saying any thing about this bond debt, it shall constitute part of the residue of his estate; and no parol evidence, however clear and strong, shall be admitted, to shew the testator's intention to discharge the party from the bond. *iv. 179*

In a dispute between the Lord of a Manor and his tenants, relative to a custom, deeds between the Lords and tenants of neighbouring manors, are admissible evidence to support and explain the custom. *iv. 204*

The answer of an impropriator, admitting the vicar's right to all tithes, except corn and grain, is not sufficient evidence to establish that right against the occupiers. *iv. 216*

An old decree for the payment of tithes, is evidence of a vicar's right, though no endowment can be shewn, nor any proof of payment in pursuance of that decree. *iv. 216, 235.*

Depositions of witnesses are not to be suppressed, because made in the express terms of voluntary affidavits, sworn by them at the commencement of the suit. *iv. 397*

Where a defendant cross-examines the plaintiff's witnesses, he cannot afterwards move to suppress their depositions in chief. *ibid.*

Affidavits of a defendant's illness and incapacity to put in an answer, are admissible evidence on which to ground an application to discharge process of contempt, and receive the answer; though the suit be instituted in *Ireland*, and the affidavits sworn in *England*; and though a decree has been taken *pro confesso*, in consequence of the contempt. *iv. 546*

A Court of Equity may, upon the testimony of witnesses, determine upon the sanity or insanity of a person, without sending it to a trial at law. *iv. 557*

A lease is attested by three witnesses, and on the trial of an ejectment to recover the lands, a single witness proves, that two of the subscribing witnesses are dead, and that the third is resident at *Rotterdam*, in *Holland*; yet the plaintiff was permitted to prove the hand writing of all the three subscribing witnesses; and having so done, he obtained a verdict. *Vol. v. page 37*

B. the master of a ship, enters into a charter-party, on behalf of *C.* his owner, with *D.* On a bill brought by *C.* against *D.* for satisfaction of demurrage and other damages, *B.* is examined as a witness. At the hearing, the bill is retained, with liberty for *C.* to bring his action at law. This action was permitted to be brought in the name of *B.* after his death; and though he was the nominal plaintiff therein, yet his deposition in the Equity suit, was allowed to be read in evidence at the trial of the action, *v. 121*

Where a deed is wilfully destroyed, every thing is to be presumed against the party, in *odium spoliatoris*; and therefore, the parol evidence of the person who prepared the draft, though at the distance of several years, is admissible to prove the general contents of it. *v. 300*

The office copy of a bill cannot be read in evidence, if the original is not upon the file; though an officer of the Court is ready to prove, that the original cannot be found among the records. *v. 340*

Entries of presentments in the books of a manor, are not evidence of acts of ownership. *ibid.*

No parol evidence is admissible to prove a trust. *vi. 12*

Nor is the evidence of a person who prepares a will, admissible to prove the declarations of the testator, at the time of his giving instructions for it. *vii. 18*

But under certain circumstances, parol evidence is admissible to explain the nature of an agreement in writing, and to shew the conduct of the parties concerning it. *vii. 445*

In what case an old map of an estate is good evidence, to ascertain the quantities and boundaries of particular lands. *vii. 518*

Executors.

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Executors.

In what case a Court of Equity will restrain an executor, in the exercise of a discretionary power. *Vol. i. page 34*

Where an executor makes an unfair appraisement, which is afterwards falsified in several instances, by his own examination on interrogatories, he shall pay the costs of the suit. *i. 115*

In what case an executor may be liable to the demand of an attorney, whether there be assets or not. *ii. 118*

An executor is not bound to give security, nor is it usual for a Court of Equity to compel him to give any, unless upon affidavit of insolvency, or misconduct. *iii. 348*

But where an executrix marries a second husband, who is in necessitous circumstances, and there are infant children of the first marriage, the Court will appoint a receiver. *ibid.*

Where an executor borrows, or advances money to pay some of his testator's creditors, more importunate than the rest, he is entitled to an allowance of interest for the money so borrowed. *iii. 503*

Where a legacy is given to one of two executors, neither of them is thereby excluded from the surplus of the testator's personal estate undisposed of. *iv. 1*

A. devises the residue of his real and personal estate to his two executors, as tenants in common, and one of them is indebted to him on bond. This bond debt is not released or extinguished by the devise, but shall be divided between them. *iv. 179*

Where a man appoints two executors, and makes no disposition of the residue of his estate, they are entitled to such residue as joint tenants. *iv. 224*

A. being possessed of a bond for 1400*l.* deposits it in the hands of *B.* who signs a proper acknowledgment for the same. *A.* afterwards assigns this bond to *B.* and takes his promissory note for the value, but the note was never paid. *A.* by his will gives several legacies, and appoints *B.* and another executors; but makes no disposition of the residue of his estate. Held, that the money due on this bond is part of the residue, and shall go to the executors equally;

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and that *B.*'s note is not such a debt, as can be extinguished by his being made an executor. *Vol. v. page 217*

An executor retaining a large part of a testator's personal estate, during the pendency of divers suits, touching the validity of some of his debts, shall be chargeable with interest for the annual balance in his hands. *vi. 319*

Where a man gives his wife a legacy of 300*l.* which he declares to be her own money, and makes her executrix, but makes no disposition of the residue of his estate, this legacy shall not exclude her from being entitled to such residue. *vii. 511*

Where an executor is sued upon a parol promise of paying the debt, it is sufficient to ground a judgment against the assets of the testator; but where such promise is attempted to charge the executor *personally*, and to ground a judgment against his own effects, it must be proved to be in writing; otherwise it is void. *vii. 550*

Fine.

A. Tenant in tail, levied a fine to the use of *B.* for the life of *B.* with warranty; and afterwards he levied another to the use of himself and his heirs, with warranty; and then sold the lands to *C.* and his heirs. The first fine made a discontinuance only during the life of *B.* for when the wrongful estate which caused it is gone, it remains no longer a discontinuance. *i. 48*

The obtaining a fine by fraud, and erasing several parts of it, to make it correspond throughout, is a crime in the persons concerned, but not relievable in a Court of Equity; being examinable only in the proper Court where the fine was levied. *i. 137*

A fine mentions only two messuages, but the deed of uses, besides mentioning these two messuages, has the general words of *all other the messuages, lands, tenements and hereditaments of the said B.* In this case, the deed and not the fine shall be the measure of what passes. *i. 156*

No evidence of the caption of a fine, is admissible to contradict the record of it, which

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which is the chirograph; and which cannot be falsified, until it is reversed or vacated. Vol. i. page 379

The intention of marriage articles for a subsequent settlement, will be so much regarded in a Court of Equity, as that if a fine be levied to different uses, the Court will set it aside. ii. 122

Where a fine and recovery is of so many acres in S. the party interested shall have his election, where and in what parts of the estate, the fine and recovery shall operate. ii. 466

A fine cannot be levied of money, or of the trust of money. ii. 494

There must be an actual entry, to avoid a fine; and no ejectment can be maintained, where the demise is laid before the time of such actual entry. iv. 353

Foreign Laws, Customs, &c.

An agreement made in *Paris* on the marriage of two *French* people, touching the wife's fortune, will be decreed in *England* to be executed accordingly. i. 38

By the custom of merchants, if the master of a ship is supplied with necessaries for the ship, by the order or credit of any freighter; the owner of the ship is liable to such freighter, for the value of the necessaries so furnished. i. 284

By the laws of *Antigua*, all deeds relating to estates in that island, must be registered there, in order to make them effectual. iii. 285

And by the same laws, all the stock, utensils, erections and buildings upon a plantation, are liable to the payment of debts, except negroes and other slaves, which are considered as affixed to the freehold, and cannot be sold to pay debts, unless there is a deficiency of general assets. iii. 289

Forfeiture.

Where a man after mortgaging his estate is indicted and outlawed for High Treason, his equity of redemption becomes forfeited; and the Attorney General, on behalf of the crown, may redeem. i. 222
A. seised of a freehold lease for lives, is in-

dicted and found guilty of coining; the whole estate becomes forfeited to the crown, notwithstanding the proviso in 8 & 9 Will. III. c. 26. Vol. i. page 274

The office of warden of the Fleet Prison, is an ancient office of inheritance, held by grant from the crown; and is liable to be forfeited, by the warden's permitting a prisoner to escape. i. 331

Fraud.

Tenant in tail made a lease to *A.* in consideration of his procuring a marriage between the lessor and a lady of fortune. This consideration was held to be fraudulent, and the lease set aside. i. 57

The defendant in a cause suppresses a settlement, but upon proof that it actually came to his hands, the party entitled shall hold and enjoy the lands according to the settlement. i. 151

A. being standing counsel and manager for *B.* obtained leases for long terms, of different parts of his estate, and a release of the equity of redemption of other part. On a bill brought to set aside these transactions for fraud, it was proved, that *A.* had as great power over *B.* as a parent has over a child, and could persuade him to do whatever he pleased; but it being proved on the other side, that the purchase money was nearly equal to the value of the lands, and that *A.* had in many respects been exceedingly serviceable to *B.* the bill was dismissed. i. 164

J. S. the heir at law of *A.* artfully obtains the original will of *A.* and by suppressing it, lays claim to the whole real estate. In this case, the Court declared, that the contents of the will, thus suppressed, ought to be most strongly presumed against the defendant, and to be taken as stated in the plaintiff's bill; and therefore it was decreed, that the plaintiff should hold and enjoy the estate, until the defendant produced the will, and further order. i. 250
A. with *B.* and *C.* as his sureties, execute a bond to *D.* for securing 300 *l.* and interest. The debt is paid by *C.* with the proper money of *A.* but *C.* neglects to deliver up the bond

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Bond to *A.* and afterwards procures it to be assigned as a collateral security for a debt of his own. This is a gross fraud in *C.* and the Court will award a perpetual injunction, to restrain all further proceedings upon the bond. *Vol. i. page 271*

In the case of fraud, a *particeps criminis* is the most proper person to discover and prove it; especially, when what he so proves turns to his own prejudice. *i. 273*

Lands of 353*l. per ann.* were demised in trust, for the sole and separate use of *K.* during the joint lives of herself and her husband. The husband being afterwards outlawed for high treason, these lands became forfeited, and were granted by the crown to *S.* his brother, subject to all legal and just incumbrances. *S.* having withheld the rents of these lands from *K.* whereby she was reduced to great necessity, she was prevailed upon to release her interest to him, in consideration of 100*l.* paid down, though the arrears amounted to 1200*l.* and an annuity of 200*l. per ann.* during the joint lives of herself and her husband. This release was set aside as fraudulent, and *S.* was decreed to account for the whole rents and profits. *i. 300*

A. under pretence that *B.* was instrumental in procuring an advantageous marriage for *C.* obtains a bond from *C.* to *B.* for 1000 guineas, as a reward for his services. The bond is paid when due; but nine years afterwards, *C.* discovers the whole to have been a gross imposition in *A.* and that he in fact received all the money. On a bill brought, *A.* was decreed to repay *C.* the whole money, with interest and costs. *i. 445*

J. S. and *W.* his eldest son, join in a mortgage for 100*l.* and interest; and after payment it was declared, that the premises should be to the use of *J. S.* for life, remainder to *W.* and the heirs of his body, remainders over. *B.* takes an assignment of this mortgage and afterwards purchases part of the premises of *J. S.* who levies a fine. This sale was held to be a fraud upon *W.* and set aside accordingly. *i. 498*

A. made an absolute conveyance of lands to

B. and his heirs, in consideration of 1500*l.* which was the full value; but on the next day, *B.* executed a defeazance, declaring that if *A.* or his heirs, should, within 16 years, pay *B.* the 1500*l.* the conveyance should be void. *B.* entered and enjoyed the lands, and afterwards settled them upon his marriage; to which settlement *A.* was privy, but took no notice of the defeazance. After *B.*'s death, *A.* set up the defeazance, and filed his bill to redeem; to which the son and heir of *B.* pleaded his father's purchase deeds, and marriage settlement. The court were of opinion, that the intent of the conveyance being to enable *B.* to obtain a wife with a considerable fortune, such intention was fraudulent; and therefore awarded a perpetual injunction, to stop all further proceedings under the defeazance. *Vol. ii. page 88*

A. agreed with *B.* for the purchase of timber, and together with *C.* entered into a bond, that *A.* his executors and administrators, should not cut any timber under a particular size; but *A.*'s name was only made use of in this agreement for *C.* *C.* cuts down timber under the size stipulated; but as there could be no remedy upon the bond against *C.* it was held to be a fraud upon *B.* the seller, and therefore relievable in equity. *ii. 170*

Where articles and a conveyance are not obtained with the strictest fairness, a Court of Equity will set them aside; and order the conveyance to stand as a security only for the consideration money. *ii. 405*

By an *Irish* statute 6 *Ann.* all deeds executed after the 25th of *March* 1708, and not registered, are declared void. A lease of lands was neglected to be registered, which the lessor taking advantage of, granted a new lease to another person, who brought an ejectment, and recovered. In this case, the original lessee was held to be relievable in equity; for the statute being made to prevent fraud, shall never be used as a means to cover it. *ii. 425*

A. brought his bill for an allowance of a certain sum of money, as a commission upon the sale of goods by auction, where he attended as a puffer, to enhance the price of the

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the goods. Bill dismissed with costs; the demand being of such a nature, as ought not to have any countenance in a Court of Equity. *Vol. iii. page 263*

Where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a Court of Equity will set aside the purchase as fraudulent; even after the purchaser's death.

iii. 560

A. files his bill to be relieved against a long lease granted by his ancestor, upon the foot of fraud; but not giving sufficient evidence of the fraud, his bill was dismissed, with costs. Some years after, *A.* filed a new bill for the same purpose, charging fresh proofs of the fraud, which were not discovered pending the former suit; and upon hearing this second cause, the lease was set aside.

iv. 80

J. S. on his coming of age, was prevailed on to join with his father, in making a settlement of the father's estate, but it being afterwards discovered, that this settlement was repugnant to certain articles which the father had entered into previous to his marriage, and which were totally concealed from *J. S.* the settlement was set aside for fraud, and the articles established.

iv. 199

A father makes his son by the first wife, agree to a provision for a second wife and her children, in the son's own wrong, and who at the time of the agreement was ignorant of his right. This is a fraud upon the son, and he is not bound to a performance of the agreement.

iv. 237

Where in a treaty for an agreement, one of the parties wilfully conceals a material fact, in order to keep the other party in ignorance, and to profit by that ignorance; this is a gross fraud, and will, in Equity, set aside the contract.

iv. 497

A. obtains a conveyance from an insane person, long before any commission of lunacy issues. This is a fraud, and the conveyance shall be set aside; though the consideration money was near the value of the estate.

iv. 557

A. being a poor man, and weak in his intellects, was prevailed on by *B.* his neigh-

bour to sign a paper, alledged to be an appointment of *B.* to be the receiver of the rent of a small estate belonging to *A.* and let for 20 *l.* per ann. on a lease almost expired. This paper afterwards appeared to be an agreement for a lease of the estate to *B.* at only 14 *l.* per ann. Soon after, *B.* obtained an actual lease from *A.* of this estate, for a term of 41 years, at the yearly rent of 14 *l.* in consideration of 5 *s.* a receipt for which was signed and witnessed; but no notice was therein taken of the agreement. Held, that this lease was void, as having been obtained by fraud and imposition.

Vol. v. page 30

The wilful concealment or destruction of a deed, is a fraud upon the parties interested; and therefore every thing shall be presumed in their favour, against the person guilty of the fraud.

v. 300

A. usually employed *B.* as his agent to buy hops of the several planters in and about *Canterbury*, but having in a particular season, omitted to give him any orders at the usual time, *B.* enters into a partnership with three others, for purchasing hops of that year, for their mutual benefit. The hops are accordingly purchased, but *A.* having intelligence of this transaction before they were delivered, prevails upon *B.* to declare to the planters, that he bought them as *A.*'s agent, and by that means *A.* got the hops delivered to him. Held, that this was a fraud upon the partners of *B.* and that *A.* should account for the value of the hops, according to the highest price for which he sold them.

vi. 380

It is the peculiar province of Courts of Equity to give relief in all cases of fraud, or of contracts in which any advantage is unduly taken by either of the parties, of the distress or necessity of the other. And therefore, where *A.* purchases an estate of *B.* for 1000 *l.* and gives his bond for part of the purchase money, and afterwards unfairly gets the bond into his own possession, a Court of Equity will oblige him to pay the principal and interest thereby secured.

vi. 614

J. S. purchases an estate of his aunt for 10,000 *l.* which was proved to be worth

20,000 *l.*

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20,000 *l.* and upwards, but in the conveyance adds the consideration of natural love and affection. Held, that this was a gross fraud upon the aunt, and the conveyance was accordingly set aside. *Vol. vii. page 70*

Guardian.

UNDER what circumstances an account settled between a guardian and his ward, shall be binding upon the ward.

i. 372

By an act of parliament passed in *Ireland*, 2 *Ann.* "to prevent the further growth of popery, no person professing that religion, can be the guardian of an infant; but such guardianship, where the person entitled to it is a Papist, shall be disposed of by the Court of Chancery in that kingdom, to some near relation of the infant, being a Protestant, and one to whom the infant's estate cannot descend; and if there shall be no such Protestant relation, then to some other proper person, who will use his utmost care to educate the infant in the Protestant religion, until the age of 21. ii.

179

A declaration of a father upon his death-bed, that he expected *A.* his father would take care to see his child educated in the Protestant religion; is a sufficient appointment, to make the grandfather guardian of the infant.

ii. 539

Where the father of an infant devises the guardianship to the mother, the Court of Chancery has no power to controul this will, unless upon complaint and proof made of misbehaviour in the mother. iii. 341

Where a guardian by his will remits to his ward whatever is due to him for his maintenance, it will include all demands for his education. iv. 186

Incumbrances.

MORTGAGES are not to be preferred to other real incumbrances; but they shall all take place according to their

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priority, and as they severally stand in order of time. *Vol. i. page 66*

Lands are sold to *A.* subject to an annuity of 15 *l.* a year to the sister of the vendor. The lands are afterwards mortgaged, and otherwise charged by *A.* and thus charged, descend to his heir at law. A Court of Equity will make a *personal* decree against the heir, for the arrears and growing payments of this annuity. i. 247

Indictment.

In an indictment for perjury, the crime was alledged to be committed in the time of the late King, but was charged to be against the peace of the *now* King. This error is fatal, and renders the indictment totally insufficient. vi. 138

Infant.

An account settled between a guardian and an infant soon after he comes of age, shall not, under certain circumstances, be conclusive or binding upon the infant. i. 372

An infant is not bound by the decree of a Court of Equity, but must have a reasonable time after he comes of age, to shew cause against it. iii. 1

And upon his coming of age, he may amend his answer, or put in a new answer; but he cannot amend an original bill, as to any points wherein it has been dismissed upon the merits. iii. 301

Where the father of an infant devises the guardianship to the mother, the Court of Chancery has no power to controul this will, unless upon complaint and proof made of misbehaviour in the mother. iii. 341

By articles made previous to the marriage of a female infant, it was agreed, that in consideration of a suitable jointure to be made by the husband, after the wife should come of age, the whole of her real estate should be limited to the husband in fee. The jointure was accordingly settled; and the wife being of age, was a party to the deed. But it was held, that she was not bound by the articles, and that her acceptance of a jointure, did not amount to a confirmation of them. iii. 514

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The

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The guardian of two infants gives each of them a legacy of 100 *l.* and remits whatever was due to him for their *maintenance*. This includes all demands for their *education*. *Vol. iv. page 186*

In what case a Court of Equity will direct an enquiry, whether it will be for the benefit of an infant heir, to perform an agreement made by his father. *iv. 435*

A mortgagor brings a bill to redeem, and obtains the usual decree for an account, and the account is accordingly taken by the Master. Before any further proceeding the plaintiff dies, and his infant son and heir revives, and carries on the suit. In this case, he is bound by the account already taken, but shall be at liberty to surcharge and falsify it, if he can. *iv. 447*

A female infant married, having before such marriage a jointure made to her in bar of dower, is thereby bound and barred of dower, within the statute 27th *Hen. VIII. c. 10.*

v. 570

Information.

An information for an offence, is a surmise, or suggestion upon record, on behalf of the King, to a court of criminal jurisdiction, and is to all intents and purposes the King's suit; and may be filed by the Solicitor General, during the vacancy of the office of Attorney General. *vi. 345*

In such a case, it is not necessary in point of law, to aver upon the record, that the Attorney General's office was vacant. *vi. 354*

How far an *innuendo* or averment is or is not necessary to support a charge of a libel, consisting in opprobrious words or signs. *vii. 543*

Injunction.

After five several trials at law, and the verdicts all the same way, the Court of Chancery will grant a perpetual injunction to stay all further proceedings at law, by the litigant parties, or any claiming under them upon the same title. *i. 266*

That Court will also award a perpetual injunction to restrain waste, by ploughing, burning, breaking, or sowing of downland. *i. 357*

After two trials at bar by direction of the Court of Chancery, and both verdicts the same way, the Court will grant a perpetual injunction, and decree upon the right found by the verdicts. *Vol. ii. page 207*

Where a decree awards an injunction to put the plaintiff into possession of the premises in question, and at the same time directs the parties to try the title at law; the decree is repugnant to itself, and must be reversed, as to the injunction. *ii. 267. See vide iii. 276.*

On a bill filed to stay waste, and an affidavit of the waste committed, an injunction issues till answer, or further order. And though the defendant, after putting in his answer, moves to dissolve the injunction, and consents to appear to an action of debt, or trover, and to take short notice of trial; yet the injunction ought not to be dissolved, but continue till the hearing of the cause. *iii. 374*

It is usual in *Ireland*, for a lessee who has been three years in possession and is disturbed, to file his bill in the Court of Chancery there, for an injunction to quiet him in possession, till evicted by due course of law; and this usage is founded upon the equity of the statutes against forcible entries. But all bills of this kind must alledge, and it must also be proved, that the sole and actual possession is in the plaintiff, and that no ownership or possession is in any other person. *iv. 128*

Under what circumstances a commission to examine witnesses abroad, and an injunction to restrain proceedings at law in the mean time, ought not to be granted. *vii. 192*

But where the party applying for such commission, appears from the nature of his case to be entitled to it, the granting an injunction in the mean time, is no more than a necessary consequence of that right. *vii. 245*

Insurance.

Policies of insurance against loss or damage by fire, are not, in their nature, assignable; nor can the interest in them be transferred from

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from one person to another, without the express consent of the office. *Vol. iii. p. 497*

Where a man purchases a house which is insured, and afterwards burnt down, and subsequent to the accident, the purchaser takes an assignment of the policy of insurance, he is not entitled to recover upon this policy. *ibid.*

To recover upon a policy of insurance, the party must bring an action at law; for if he files a bill in equity, it may be demurred to, and the demurrer will be allowed. *iii. 525*

Insurance was made upon a privateer for a cruise of four months. During the cruise the crew mutinied, and carried the ship into port, whereby the benefit of the cruise was lost. But as the ship, which was the only thing insured, was in safety at the expiration of the four months, the underwriters were held not to be liable. *v. 131*

Sed vide several contrary determinations of the Courts below, in the *notes, 138,—141*

In the case of a valued policy on both ship and cargo, the assured must recover the whole sum underwritten; because he could not have any claim for a return of premium for short interest, if the ship had arrived safe. *vi. 588*

A wilful deviation from the due course of an insured voyage, is in all cases a determination of the policy; from that moment, the contract between the insurers and insured is at an end; and it is totally immaterial from what cause, or at what place, a subsequent loss arises, the insurers being in no case answerable for it. *vii. 459*

Interest.

Interest will run upon the aggregate sum in a Master's report, from the time of confirming the report. *i. 202, 566*

It has been the constant rule of Courts of Equity in *Ireland*, that where by a general and national calamity, nothing is made out of lands which are a fund for the payment of interest; no interest ought to run during the continuance of such public calamity. *i. 526*

An arrear of interest remaining due at the time

of assigning a mortgage, shall not carry interest. *Vol. ii. page 59*

Where a ship and cargo are wrongfully taken, the defendant shall answer the value thereof, together with interest; and this happening in *India*, the interest of that country shall be allowed, deducting the charge of the return. But as *India* interest varies in its rates, the computation shall be according to a medium rate, for the time since the ship and cargo were taken. *ii. 72*

Where an obligee in a bond obtains judgment for the penalty, and costs, the judgment will not carry interest. *ii. 159*

But where advantage is made of the money, interest shall be carried beyond the penalty. *ii. 251*

A Court of Equity will not carry interest beyond the penalty of a bond, where the demand is stale, and appears to have been neglected for many years. *ii. 275*

But interest may be carried beyond the penalty, where the bond is only taken as a collateral security. *ii. 333*

By marriage articles, the lady's father was to pay her portion at different times, and in different sums, towards disincumbering the husband's estate. The father advanced money to the husband, and also maintained his wife and child for many years. The money so advanced, together with an allowance for the maintenance, shall be added to the foot of the account, but shall not carry interest. *ibid.*

Where excessive prices are charged for work, on account of slow and precarious payment, no interest ought to be allowed; for interest is only allowed, to supply the want of prompt payment. *ii. 500*

Where a man articles for the payment of a debt by instalments, each instalment carries interest from the time it ought to have been paid. *iv. 164*

Under what circumstances, an executor or trustee shall be chargeable with interest for money in his hands. *vi. 319*

Joint-Tenants.

J. S. being entitled to a debt of 20,000 *l.* due from the crown, devises the same to six of his

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his relations, *equally to be divided between them, share and share alike; and if either of them die, to the survivors or survivor of them.*

All the legatees survived the testator, but before the debt was recovered, one of them dies. His representative is not entitled to any part of this legacy. *Vol. i. page 189*

Where lands are devised to *B.* and *C.* and the survivor of them and their heirs, equally to be divided between them, share and share alike; *B.* and *C.* are joint-tenants for life, with several inheritances. *iii. 297*

A. by his will gives several legacies to his children, and appoints his two eldest sons joint executors; but makes no express disposition of the residue of his personal estate. This residue belongs to the executors as joint tenants; and if one of them dies without making any severance, the whole survives to the other. *iv. 224*

Where two executors are joint-tenants of the residue of a testator's personal estate, their employing part of it in trade for their mutual benefit, does not amount to a severance as to the whole. *ibid.*

Lands are settled to the use of husband and wife for their lives, remainder to the heirs of both their bodies. The children of this marriage are joint-tenants, and if any one dies before severance, his share shall survive to the others. *vii. 49*

There is nothing hard, severe, or unreasonable in the law of joint tenancy, there being always an equal chance of survivorship in all the joint tenants. If any of them have a bad opinion of their own lives, they may sever; but if the joint tenancy be not severed, it is an evidence of intention in the party, to submit to the chance of survivorship; or of that supineness and neglect, to which the law affords no assistance *vii. 57*

Jointure.

Where jointure lands are covenanted to be of a certain yearly value, but fall short, and the estate becomes forfeited for high treason; the jointress is entitled, as against the grantee of the Crown, to have the deficiency made good. *i. 405*

So where lands are settled in jointure, and covenanted to be of the value of 500*l.* per ann. but the husband afterwards discovering a defect in his title, settles other lands, and declares them to be in recompence of all deficiencies, either in the title or value of the lands before settled; the jointress shall have lands of the full value of 500*l.* over and above the other lands, and all other provisions made for her by her husband's will. *Vol. i. page 464*

A. jointure settled on a wife by articles, to which she was no party, will not deprive her of dower. *i. 538*

Lands settled in jointure, are covenanted to be of the yearly value of 1000*l.* The husband by will gives his wife 1000*l.* and other legacies. The jointure lands prove deficient, 300*l.* per ann. Held, that the legacies, which were admitted to be of greater value than the defect of jointure, ought to be taken in satisfaction of such deficiency. *i. 553*

In what case a jointress is entitled not only to have a deficiency in the jointure lands made good out of other lands, but also to come in as a specialty creditor upon her husband's estate, for the arrears of the deficiency, with interest. *iii. 187*

Where, in marriage articles, the lands agreed to be limited in jointure, are expressed to be of the yearly value of 500*l.* and afterwards prove deficient; this amounts to an agreement that they were of that value, and is a sufficient foundation for making up the deficiency *iii. 402*

Iur.

A. gives three bonds to *B.* for 500*l.* each, payable at different times. The two first are paid; and upon the parties settling an account relative to other matters, the third bond is delivered up by mistake, instead of a particular voucher. Equity will relieve against this mistake, by directing an issue, to try whether there were two bonds or three, and whether the last bond was paid, or not. *i. 134*

In a suit for tithe of hay, the defendants by their answer only, set up several moduses by the

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the name of *strew-tithes*. In this case an issue is proper, to try the validity of these moduses. Vol. i. page 140

In an issue directed to try, whether *M.* made a contract for his own use, or in trust for others; *M.* is very properly made a party, and ought not to be a witness; for as a witness, he would be answering to his own advantage, by lessening the number of his partners in a beneficial contract. i. 426

In what cases the Court of Chancery will settle a difference in damages, by way of estimate, without sending the matter to be tried by a jury. ii. 65

But whether a party has broken any of his covenants or not, is a matter properly triable at law; for the damages, supposing a breach, cannot be settled without such trial. ii. 134

No issue ought to be directed, to try a matter not fully put in issue in the cause; and therefore, where a bill was brought to take advantage of a forfeiture, by marrying without consent, and an issue was directed to try whether the party was a papist or not, at the time of the marriage, the order was reversed; and the plaintiff was left at liberty to amend his bill, by putting in issue in the cause, the matter so intended to be tried by a jury. ii. 194

In the case of a charity, the most expeditious and least expensive methods of proceeding should be adopted; and where no material fact is disputed, nor any point of law arises, but what a Court of Equity may determine, such Court ought to determine *finally*, without directing an issue. ii. 287

Where the facts of a case are so manifestly fraudulent, that the whole transaction may be called a fraud *apparent*; no trial at law ought to be directed. ii. 405

A parson sued for 2 s. 9 d. *per pound* for tithes of houses in *London*, under the statute 37th *Hen. VIII.* But an issue was directed to try, whether less than that sum had ever been paid; though there was no proof of any regular modus. ii. 437

An issue to try *whether a particular manor was intailed by a particular deed*, is not proper, being rather a point of law than a matter of

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fact; at least so complicated, as not to be fit for the enquiry of a jury. V. ii. p. 457

Where a party claims under marriage articles, and settlements made in pursuance thereof, it is not sufficient to direct an issue to try the validity of the articles only; but the issue should be extended, to try the execution of the subsequent settlements. iii. 119

In what case a commission of inquiry is more proper to be directed, than an issue at law. iii. 180

Where, on an agreement for a lease, the rent, commencement, or duration of it are uncertain; or where the execution of the lease, or settling the particular terms of it, depend upon the consent of a third person; a Court of Equity will direct proper issues to ascertain these several facts, before any specific performance of the contract is decreed. iv. 567

On the hearing of an information, brought for the recovery of certain mine duties, the Court proposed to the Attorney General, an issue to try whether the Crown, or its lessee, was, by custom, entitled to those duties; but the issue being refused, the information was dismissed. On an appeal, the decree was reversed; and proper issues to try the custom were directed. v. 370

An issue ought not, after the death of a person, to be directed to try what religion he was of in his lifetime. v. 454

In taking an account before a Master, one of the parties is charged with 4000 l. as the value of a note, which he had wilfully destroyed. The Master by his report allows this charge; and upon an exception being taken to the report in that respect, the Court first allowed, and afterwards overruled the exception. But upon an appeal, an issue was directed to try the fact of spoliation, and what damage was sustained thereby. vi. 364

Under what circumstances a trial at bar is proper to be directed, after the trial of an issue. vi. 434

Wherever the question of right in a suit commenced in a Court of Equity, is a mere legal question, the Court does right in sending it to law to be tried, upon a proper issue;

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issue; even though the whole of the evidence is written evidence, and the question depends upon the construction of that evidence. *Vol. vi. page 459*

Courts of Equity have for many years past adopted a practice, which has been extremely beneficial to the suitor; for where they see the dispute between the parties is a mere question of law, and must be ultimately determined there; instead of putting the parties to the expence of a diffuse examination of witnesses in equity, they have, by interlocutory orders, either directed an issue, or given the party liberty to bring an action within a limited time, and reserved the consideration of all further directions until after the verdict. And after a verdict has been found, it has been the uniform practice of the Court, for the party in whose favour the verdict has been obtained, to set down the cause for the further directions reserved by such interlocutory order.

vi. 501

A man purchases an estate of his aunt, greatly under the value, but in the conveyance adds the consideration of natural love and affection. The truth of this consideration is proper to be enquired into by a jury, upon an issue.

vii. 70

After a sentence in the Ecclesiastical Court, determining the question of who are the next of kin of an intestate, and granting letters of administration to the person found to be such next of kin, the Court of Chancery is precluded from directing any issue to try that question.

vii. 414

Judgment.

Where on a joint judgment, one of the parties is taken in execution, and afterwards discharged, it does not operate as a discharge of both; and a Court of Equity will restrain proceedings upon an *audita querela*, brought to be relieved against this judgment, upon that ground.

ii. 67

A judgment of imprisonment against a defendant, to commence *in futuro*, i. e. from and after the determination of an imprisonment, to which he was before sentenced for another offence, is good in law.

vi. 354

Leases.

TENANT in tail made a lease to A. in consideration of his procuring a marriage between the lessor, and a lady of fortune; this lease was set aside as fraudulent. *V. i. p. 57*
A. obtains a lease under the *Great Seal*, of lands lying in the county palatine of *Lancaster*; this is a good lease, and need not be under the *Dutchy Seal*, notwithstanding the statute 3 *Hen. V.*

i. 506

In a lease the lessor covenants, that if at the expiration of the term, the lessee should be desirous of taking a further lease, the lessor would grant such further lease without any fine, and under the same rent and covenants only, as in this lease. A new lease is desired and prepared, but it contains a covenant to grant a further lease at the end of the new term; the lessor objected to this covenant, as being in the nature of a perpetuity on his estate, but the objection was over-ruled.

i. 522.

It has long been an established practice, to consider those who are in the possession of lands under leases for lives or years, as having an interest beyond the subsisting term, and this interest is usually denominated the *tenant-right of renewal*; which though not any certain or even contingent estate, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements.

vii. 438

Legacies.

Where a specific legacy is given to A. provided he gives no trouble to the executor, A. must release all demands upon the testator's estate, before the executor is bound to deliver the legacy.

i. 54

J. S. by will gives to A. and B. whom he calls *his wife's children*, (not owning them to be his) 10 s. a-piece and no more. To the children whom he did own, he gives considerable legacies; but makes no disposition of the surplus of his personal estate. A. and B. are excluded from any share of this surplus, and it shall be divided among the other children.

i. 167

An

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An estate considerably mortgaged is devised to *A.* and several pecuniary legacies are given to others, to the whole amount of the testator's personal estate. The mortgage must be satisfied out of the personal estate, and the legatees must abate in proportion. Vol. i. page 210

A. by will gives all his personal estate to his wife for life, and then gives to his grandchildren *T.* and *F.* 100 *l.* a-piece, if they attain 21, or shall be married. These legacies are not payable till after the wife's death; but the legatees are entitled to have security for the payment of them at that time. iii. 45

J. S. gives a legacy of 1000 *l.* to his niece *E.* at 18 or marriage; and by a codicil directs, that this legacy shall be made up 6000 *l.* payable at 21 or marriage. The niece was 18 and under 21, at the time of making this codicil. Held, that she was entitled to interest for the whole 6000 *l.* from the testator's death, though she had not then attained 21. iii. 113

A. gave all his personal estate to trustees, until *W.* should attain 24, and then to him, his executors, &c. *W.* lived to attain 21, but died intestate before 24. Held, that his representative was entitled, and that the right vested in him immediately upon the testator's death; the age of 24, being only meant to direct the trustees as to the time of payment. iii. 337

J. S. devised his real estate to his son *J.* for life, and after his death, if he leaves any issue male, to other persons; and to one of them, he gave a legacy of 500 *l.* when he should attain 21. The son died without issue. The legatee also died; and on a bill brought by his administrator for this legacy, the question was, whether it did not depend, together with his share of the real estate, upon the contingency of the son's leaving issue male. The Court of Chancery held that it did, and therefore dismissed the bill. But on an appeal, this decree was reversed; and the legacy ordered to be paid, with interest from the testator's death. iii. 353

A. gives his daughter a legacy of 1000 *l.* to be raised out of the rents and profits of his

estate, after payment of his debts, but without mentioning any particular time of payment. This legacy will not carry interest, while any of the testator's debts remain unsatisfied; nor will the Court direct it to be raised, by a sale of any part of the estate. Vol. iii. page 503

A. gives 100 *l.* South Sea stock to *B.* and another 100 *l.* of the same stock to *C.* payable in six months after his death. Before the time expired, an addition was made by the Company to every 100 *l.* stock. The legatees are entitled to the additional, as well as the original stock. iv. 1

A. by will gives a legacy of 500 *l.* to *B.* on her marriage day, and directs, that any bonds or notes left by him in the hands of *B.*'s father, should go in discharge, *pro tanto*, of the legacy. The testator had in fact deposited sundry securities, but the statute of limitations had run upon them in his lifetime. On a bill filed by the legatee after her marriage, she was held to be entitled to the legacy and interest, without deducting the value of the deposited securities; because they could not, at the time of the testator's death, be applied in satisfaction of the legacy, within the intent and meaning of his will. v. 145

Limitations.

In marriage articles, there was a limitation to *A.* for life, without impeachment of waste, and then to the heirs male of the body of *A.* to be begotten, and of the heirs male of the body of such heirs male. The first words [*heirs male*] are only a description of the persons who are to take, *viz.* the first and other sons; and the subsequent words denote what estate they are to take, *viz.* to the heirs male of their bodies. ii. 122

A. by deed, settles his estate to himself for life, and then to trustees, to raise portions for his younger children. Provided, that if his eldest son, who was otherwise provided for, should pay the portions, then the trustees were to stand seised to the use of him, and of his right heirs male for ever. The son did not pay the portions, but died intestate, leaving *D.* his daughter and only child. Held, that *D.* being heir general, was entitled

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titled to the estate, subject to the portions.

Literary Property:
see p. 80.

Vol. iii. page 20

Marrriage.

THE sentence of the Ecclesiastical Court, in a cause of jactitation of marriage, is conclusive; and the legality of that marriage cannot afterwards be agitated in a Court of Equity, even though the proceedings in the Ecclesiastical Court were conclusive. iii. 62

Marrriage Articles.

A. on marrying a second wife, settled lands to himself for life, remainder to his wife for life, remainder to the issue male of the marriage, with remainders over. This settlement was defeazanced by a proviso, that if *A.* or his heirs, should, within years next issuing, settle other lands of equal value to the same uses, then from and after such settlement, the uses before declared should cease; and the trustees should stand seised to the use of *A.* his heirs and assigns. *A.* lived 23 years afterwards, but made no new settlement. The eldest son and heir of *A.* within a year after his father's death, claimed the benefit of this proviso; and he was held to be entitled to it, on making a settlement of land accordingly. i. 342

R. S. on his marriage, covenanted to lay out 1000 *l.* in the purchase of lands of inheritance, to be settled on his wife for life, and that the reversion should descend to the child or children of the marriage. There was issue three children, but no purchase or settlement was made pursuant to the covenant. *R. S.* by his will gave his eldest son sundry debts, amounting to 2400 *l.* and having made a provision for his daughter, he gave the residue of his estate, which was all personal, and amounted to upwards of 20,000 *l.* to his youngest son. In this case it was held, that the eldest son was entitled to a satisfaction for the 1000 *l.* and interest, out of his father's assets. i. 460

C. by articles on his marriage with his first wife covenanted, that all the lands which he should purchase during his life, should

descend to, or be settled upon the heirs male of her body by him begotten. No settlement was made pursuant to these articles, but *C.* having purchased lands, settled them upon his marriage with a second wife, to different uses. Held, that the eldest and only son of the first marriage, was entitled to a specific performance of these articles, and a conveyance was decreed accordingly. Vol. i. page 470

J. S. on his marriage covenants to settle lands to the use of himself for life, remainder to the heirs of his body by his intended wife; and to make a settlement accordingly within two years, or in default thereof, to stand seised to the same uses. Though this is an estate tail in *J. S.* at law, yet a Court of Equity will turn it into a strict settlement. ii. 122

If marriage articles are for a settlement to be made to the husband for life, then to the wife for life, and then to the first and other sons, and the heirs male of their bodies, &c. the Court of Chancery will decree a limitation to trustees, to preserve the contingent remainders: And if by fine, or otherwise, these remainders are destroyed before they take place, the Court will set them up again. And if in any particular the settlement made is defective, a second settlement must be made, till the uses in the articles are well and effectually raised; for till then the covenant subsists. *ibid.*

By marriage articles it was agreed, that if there should be but one daughter, she should have 500 *l.* for her portion; and that 200 *l.* should be paid to each of the other younger daughters. There were three daughters of the marriage, and the elder claimed to be entitled to a portion of 500 *l.* But the Court held, that she was only entitled to a portion of 200 *l.* ii. 263

A. covenants by marriage articles, that the estate agreed to be settled, is worth 500 *l.* *per ann.* clear of all incumbrances; and also to purchase other lands of 300 *l.* *per ann.* and settle them to the same uses. The new purchase was never made, and the estate settled was incumbered beyond its value. Held, that out of the purchase money of

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of *A.*'s estate not settled, so much shall be paid to the eldest son, as is equivalent in value to 800*l.* *per ann.* computed at 22 years purchase. Vol. ii. page 565

A. on his marriage covenanted, that if his wife should die before him, leaving issue of their bodies, he would pay, grant, secure, or sufficiently settle to and for such issue, one third part of all his chattels real and personal, which at the death of the wife he should be possessed of; to be divided between them, if more than one, as he should direct. The wife died, leaving two daughters; and the husband, during the coverture, acquired some freehold leases for lives. Held, that these leases were included in the covenant; but that the daughters were not entitled to a division, until after the father's death; which he was decreed to give security to make. v. 208

In what case money covenanted by marriage articles to be laid out in lands, and not laid out, shall still be considered as money, and go to the personal representative, in prejudice of the heir. v. 269

A. on the marriage of one of his daughters covenants that she and her children should, after his death, divide with his sons half a share of what he should think proper to be inherited by the most beloved of his sons. *A.* afterwards made his will, without leaving any thing to this daughter, or her children. Held, that the covenant was intended to operate only in the event of an intestacy. v. 416

Mortgage.

Mortgages are not to be preferred to other real incumbrances; but mortgages, judgments, statutes and recognizances shall take place according to their priority, and as they stand in order of time. i. 66

A mortgagee, without notice of an old settlement, shall not be deprived of his remedy against the settled estate; though the other lands comprised in the mortgage are sufficient to satisfy his demand. i. 68

A. by will devised a chattel estate to his executor, that out of the profits his daughter should receive the interest of 2000*l.* and that the principal should be raised out of

the surplus profits. The executor afterwards mortgaged this estate for 1800*l.* Held, that the 2000*l.* and interest should be raised in preference to the mortgage. Vol. i. page 71

A mortgagee (not in possession) joins with the tenant for life, in a sale of the next presentation to a church; this sale is void as against the person in remainder; and upon an avoidance, the purchaser, as a trustee for him, shall present such person to the church, as the remainder-man shall appoint. i. 81

A mortgagee of a leasehold estate getting possession by ejectment, is liable to the lessor for all the arrears of the reserved rent; and where, to exonerate himself, he prevails upon the lessor to distrain upon the goods of the lessee, which are already taken in execution by a judgment creditor; he shall pay to such creditor, whatever he has been obliged to pay to the lessor, with damages and costs. i. 105

After a decree of foreclosure had been made absolute, and the mortgagee had been for many years in possession, he made his will, and thereby disposed of the mortgage debt in these words: *And if Mr. S.'s debt be well paid, as I doubt not but it will, I order my executor to pay the sum of 4800*l.* (which was the exact amount of the debt) amongst the children of my nephew J.* Held, that this devise did not open the foreclosure, and that the testator's calling it a *debt*, did not alter the nature of his interest in the premises. i. 119

The mortgagor of an estate releases the equity of redemption to the mortgagee, for a valuable consideration; who gives the mortgagor a note, that if he should within a year pay a certain sum, being the original mortgage money, and the money paid for the release of the equity, he (the mortgagee) would sell and convey to him the premises. This is an *original* agreement between the parties, and does not operate as a defeasance of the release, or raise any new equity to the mortgagor. i. 149

In what case a mortgage is redeemable, after 40 years possession of the mortgagee. i. 309. v. 194

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But after a decree of foreclosure is made absolute, and an acquiescence of several years in the mortgagee's possession, a bill to redeem shall be dismissed with costs. *Vol. i. page 414*

Exchequer annuities are assigned by way of mortgage, for securing 5000*l.* and interest. The money not being paid, the mortgagee sold the annuities on the *Exchange*, at the market price. This is a good sale; and there was no necessity of previously foreclosing the equity of redemption. *i. 494*

A redemption of a stale mortgage was decreed, after the mortgagee had been in possession 68 years; but this decree being made upon a *bill of revivor*, was held to be improper, and therefore was reversed. Without prejudice however to the question, whether the estate was redeemable or not, whenever it should be brought into judgment by a proper bill. *ii. 44*

An arrear of interest remaining due at the time of assigning a mortgage, shall not carry interest. *ii. 59*

It is not consistent with the rules and practice of Courts of Equity, or warranted by precedents, to enlarge the time for redemption of a mortgage, after the mortgagor has for six years acquiesced in a decree of foreclosure by his own consent; and especially, where an alteration has been made in the estate, either by pulling down, or enlarging the buildings, or otherwise. *ii. 111*

Where the proviso for redemption in a mortgage, is upon payment of the principal money in *silver*, a payment in *silver* and *brass* is no discharge of the mortgage. *ii. 151*

A mortgagee in possession for upwards of 70 years, shall not be redeemed, nor shall such possession be disturbed in a Court of Equity; so long an acquiescence, without applying for a redemption, being deemed equal to, and taken as an implied waiver of the right to redeem. *ii. 399*

But a decree of foreclosure was opened after 16 years, on account of the equity of redemption being worth much more than what was due upon the mortgage. *ii. 544*

A. being seised of a large estate, mortgages part of it, and the part so mortgaged, is

afterwards settled by a private act of Parliament in trust to pay his debts; but before this trust is performed, *A.* sells part of the mortgaged estate. The heir at law of the purchaser shall come upon the personal assets of *A.* for an exoneration against the mortgage. *Vol. iii. page 1*

Where an increase of interest upon a mortgage is stipulated by way of penalty, for not paying the reserved interest regularly, the Court, on proof of the neglect, will order interest to be computed according to the increased rate, even though it amounts to 8*l. per cent.* *iii. 68*

Tenant for life makes a mortgage in fee, pretending to be seised in fee. The mortgagee not having notice of the settlement, is not bound. *iii. 71*

A decree of foreclosure, after an acquiescence for 20 years, shall not be set aside upon a bill of review, for errors in form only, and not of substance. *iii. 315*

Lands mortgaged for two several terms of 1000 years, were afterwards settled to *A.* in tail, remainder to *B.* in tail, remainder to *A.* in fee; whereby *A.* and *B.* had successively an equity of redemption incident to their estates. *A.* by will appointed the mortgage to be paid off, and the terms assigned to *M.* and by the same will devised all his lands (being seised of other lands in fee) to *C.* and his heirs. *A.* and *B.* both died without issue, whereby the estate tail was spent. On a question, whether the equity of redemption passed to *M.* by the will of *A.* and was thereby severed from the reversion, it was held that it did not; and that *M.* stood only in the place of the mortgagee, and was liable to be redeemed by *C.* *iii. 486*

The heir of a mortgagor brings his bill to redeem an old mortgage. The defendant pleads title as a purchaser for a valuable consideration under a marriage settlement, without notice of the mortgage. The settlement was made by the original mortgagee, and there was a quiet possession of 70 years. Plea allowed. *iv. 74*

Where by the express terms of a mortgage it is agreed, that if the money be not paid within

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within a certain time, the estate shall not be redeemable, this is considered in the nature of a conditional purchase, and no redemption ought to be allowed; especially after a lapse of many years. *Vol. iv. p. 142*

So where the mortgage money is stipulated to be paid in one entire sum, and the mortgagee, and those claiming under him, had been in possession for near 100 years, without foreclosing; a bill brought to redeem, shall be dismissed with costs. *iv. 369*

Where a mortgagor brings a bill to redeem, and after a decree the account is taken by the master, but before any thing further is done, the plaintiff dies; his infant son and heir is bound by the account, unless he can surcharge or falsify it. *iv. 447*

A. gives a cash note to *C.* for 5000*l.* and mortgages his estate to *B.* as a collateral security for the money. *C.* keeps the note by him, and *B.* becomes bankrupt. *A.* brings his bill for relief against the mortgage, because *C.* neglected to turn the note into money. Held that *A.*'s estate was liable to pay the principal and interest due on the mortgage. *iv. 553*

On a bill filed to redeem a mortgage, 55 years after the date of it, 47 years after the mortgagee had got into possession, after five ejectments brought to defeat his estate by a title paramount, and after refusing by four different answers to come to an account on the foot of the mortgage, and redeem the lands; a redemption was decreed, and an account of rents and profits directed. *v. 194*

It is an established rule in equity, that a third mortgagee having lent his money, without knowing that there was a second mortgage upon the same estate, may by paying off the first incumbrancer, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, till he shall be paid what is due to him upon both mortgages. *vi. 28*

Money due upon a mortgage is a debt of the mortgagor, to the payment whereof his personal estate is primarily liable (the land being considered only as a pledge), as between his heir or devisee, and his executor, unless

some express, or necessarily implied declaration of his, exempts his personal estate, and throws the charge upon the real. *Vol. vi. page 520*

A. lends money upon mortgage at a certain rate of interest, and afterwards by parol, agrees to reduce the rate of interest; this agreement, though not in writing, is binding. But the fact ought to be tried by a jury, upon a proper issue. *vi. 580*

Notice.

A. Having notice of an incumbrance, purchases in the name of *B.* and then agrees that *B.* shall be the purchaser, who accordingly pays his money, *without notice* of the incumbrance. Though *B.* did not employ *A.* nor knew any thing of the purchase until after it was made, yet *B.* approving of it afterwards, made *A.* his agent *ab initio*; and shall therefore be affected with the notice which he had. *i. 244*

A. purchaser for a valuable consideration, without notice of an old settlement, shall not be affected by that settlement; especially if it appears to have been voluntary, and not made in pursuance of articles. *i. 586*

A. agrees to take a lease of certain lands, but previous to his signing the articles, he has notice that *B.* has a prior agreement for a lease of the same lands. *A.* disregards this notice, and procures the lease to be granted to his son. Held, that this notice to the father, affected the son; and the prior agreement being established, he was decreed to deliver up the possession. *ii. 596*

Paraphernalia.

Where a man's real and personal estate are charged by his will with the payment of debts, and afterwards turn out insufficient, his wife's jewels and paraphernalia shall be sold, towards making good the deficiency. *iii. 187*

Pardon.

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Pardon.

Offences against the private statutes of a college, are not pardoned by a general act of grace. *Vol. iv. page 41*

Parliament.

An action on the case lies for a burgess, against the returning officer of a borough, for refusing his vote at an election for members of parliament. *i. 45*

Papist.

Where lands are devised in trust to be sold for the payment of debts and legacies, and then to pay the surplus to *J. S.* a papist. *J. S.* is rendered incapable of taking the surplus, because it is not a *personal interest*, but a profit arising out of land, and not only within the express words of the statute, 11 and 12 *Wm. III. c. 4.* but within the mischief which that statute was intended to prevent. *i. 450*

A papist in *Ireland* cannot make a will, but his lands shall descend to all his sons equally; yet if the heir conforms within a year after he attains 21, he may enter. *ii. 34*

By the *Irish Acts* of Parliament for preventing the growth of Popery, Papists are disabled from holding leases of lands for any term exceeding 31 years, and under a rent of not less than two thirds of the improved yearly value, at the time of making such lease. The Court of Chancery may, upon evidence, determine the question of value, without sending it to a jury; and may also give full relief to a protestant discoverer under those acts, without putting him to his remedy at law. *ii. 128. See vide vi. 424*

By the same acts, Papists are disabled from being guardians to infants; and where the person entitled to such guardianship is a Papist, the Lord Chancellor of *Ireland* has a discretionary power to appoint either a relation, or such other person guardian, as he shall judge will best execute the office, and be the most likely person to educate the infant in the Protestant religion. *ii. 179*

A tenant in tail educated in a popish seminary, is capable of suffering a common recovery. *ii. 203*

Lands leased to a Papist, at less than two thirds of the improved yearly value, or for any term above 31 years, are forfeited to the discoverer, being a Protestant. *ii. 587*

The statute 11 and 12 *Will. III. c. 4.* which disables a Papist from purchasing lands, disables him also from taking by purchase, and consequently from taking by devise. *iii. 412*

An *Irish* Papist conforming any where out of *Ireland*, cannot purchase lands in that kingdom, before he has complied with the several requisites of the *Irish* popery acts. *iii. 567*

A Protestant discoverer is entitled to the rents and profits of the estate, from the time of filing his bill; and if he dies pending the suit, having made a will, those rents and profits will belong to his devisee. But as such devisee cannot regularly exhibit a bill of revivor, he must proceed by original bill, as a Protestant discoverer in his own right. *iv. 348*

The *English* act, 1 *Ann.* for the relief of Protestant purchasers of the forfeited, or trustee lands, annuls all leases made to, or in trust for Papists, as between lessor and lessee; yet it is not inconsistent, that such leases should under the *Irish* popery acts, be allowed to subsist for the benefit of a Protestant. *v. 103*

A lease made to a Papist, contrary to the Popery Acts, is, in respect to any beneficial interest to himself, void; because he is to have no profit by it. But still he may take as a trustee for a Protestant discoverer, to whom he will be accountable for the profits; without contradicting the true intent and meaning of the *English* Act. *v. 119*

Where a Papist, to avoid a discovery under the Popery Acts, surrenders a former lease granted to himself, and obtains a new lease in the name of a Protestant, in trust for him; the new lease shall be equally subject to a discovery by a Protestant, and he shall be entitled to the benefit of it. *v. 230*

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A Papist, by marriage articles, previous to the disabling statute 11 and 12 *Will. III.* covenants to lay out 12,000 *l.* in the purchase of land. The money is never laid out, and therefore shall be still considered as money; and go to the personal representative instead of the heir, though that heir be a Protestant *Vol. v. page 269*

On a bill brought to recover the estate of a person deceased, upon the allegation of his being a Papist, and therefore incapable of devising; the Court directed an issue to try, whether he was at any, and what time or times (distinguishing the times respectively) a Papist, or person professing the Popish religion. But on an appeal, the decree was reversed, and the bill dismissed *v. 454*

Where the Legislature imposes terms, and prescribes a thing to be done within a certain time, the lapse even of a day is fatal; because no inferior Court can admit of any terms, but such as directly and precisely satisfy the law. And therefore, where a Papist makes his recantation from Popery on the 26th of *November*, and does not receive the sacrament, &c. till the 16th of *May*, it is not a sufficient conformity. *v. 524*

A Papist having a power of revocation under a settlement, made prior to the *Irish* Popery Acts, executes that power after the acts passed. Held, that the revocation was good. *vi. 58*

On a bill brought to set aside a will, on the ground of the testator's being a Papist; an issue was directed to try, whether he was from the age of 12 years, or from any other and what period of time, constantly bred up in the Protestant religion, or not? But on an appeal, the decree was reversed; and the bill was retained for twelvemonths, with liberty for the plaintiff to bring an action at law, upon any title which he might have under the Popery Acts. *vi. 197*

And in a similar case, the plaintiff having neglected to bring his action within the time limited by the decree, the Court dismissed his bill with costs. *vi. 284*

Where a bill is filed by a Protestant discoverer,
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to have the benefit of a lease granted to a Papist, on the ground that the rent reserved is less than two thirds of the yearly value; the fact ought to be ascertained by a jury, upon the trial of a proper issue. *Vol. vi. page 424. Sed vide ii. 128*

No part of the Popery laws prohibit a Papist from devising his lands to a Protestant trustee, to be sold *bona fide* for the payment of debts, &c. *vi. 573*

A lease granted to a Papist at the full improved yearly value, but to commence at the next succeeding quarter day, is not such a future, or reversionary lease, as Papists are by the Popery laws precluded from taking. *vii. 369*

Partners.

In all sea adventures, the acts of a majority of the partners shall bind the whole. *i. 90*

Three persons agree to become partners, and equally contribute to raise a joint stock. The business was carried on by one of them only, and no articles executed, because there were reasons for keeping the partnership a secret. Held, that a draft of articles, together with a stated account, and the payment of money by the acting partner to the others, were sufficient evidence of this partnership, whereon to ground a decree for an account. *i. 196*

One of several partners, who is treasurer for the whole, enters into a contract with *A.* and afterwards failing, his estate is vested in trustees. Though the contract with *A.* concerns the partnership business, yet *A.* is not entitled to any preferable satisfaction out of the treasurer's share of the partnership effects, but must come in equally with the rest of his creditors; the money due to *A.* upon the contract, not being for wages. *i. 384*

A. agreed to take his nephew *H.* into partnership with him, and with his own hand made the following entry in a new set of books, viz. *debtor to account of stock in trade, for so much stock I put into the company's trade with my nephew H. 10,000 l.* The name of *H.* was for some time used as a partner in all the transactions of the trade;
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trade; but no articles were ever entered into between his uncle and him, nor was any part of the stock or profits received by, or made good to him. This was held to be only a *nominal* partnership, and *H.* entitled to no account. *Vol. i. page 432*

It was agreed between three partners in the trade of sugar boiling, that no sugars should be bought without the consent of the majority. One of them afterwards withdraws from the partnership, of which he gives public notice. Subsequent to this, the two other partners contract with *A.* for a large quantity of sugar, who had full notice that the third partner had withdrawn. Held, that such third partner was not answerable for any part of the sugar so purchased. *ii. 323*

In what case the act of one partner shall bind the rest, and make them liable to an equal share of damages and costs. *iii. 127*

Party.

Where a person is made a party to a bill, but not served with any process, no decree ought to be made, and much less a decree affecting the right of such person. *i. 575*

Where a person derives title under a dormant settlement, all the remainder-men in that settlement, as well as all mesne incumbrancers on the estate, must be made parties to the suit. *ii. 326*

But where an estate is subject to several incumbrances, one incumbrancer may sue without making the rest parties; at least it is cured by a decree, directing an account to be taken of all the incumbrances affecting the estate. *ii. 343*

An agent being prosecuted for a contempt in disobeying an order, of which he had no notice; may join in an appeal from that order, though no party to the cause in which the order was made. *ii. 399*

Where several persons have claims upon an estate, in the different characters of purchasers, lessees, and mortgagees, the person claiming the ultimate beneficial interest, must make them all parties to his bill. *iii. 122*

A lease of lands is granted, with an exception of mines, &c. and the power of working the same; and the lessor covenants to make satisfaction for all damages and spoil of ground, to arise by working the mines. At the time of granting this lease, certain coal mines upon the premises were demised to *J. K.* In a bill brought for a performance of this covenant against the representatives of the lessor, it is necessary to make the lessee of the coal mines a party. *Vol. iv. page 122*

When at the hearing of a cause, an objection is made for want of parties, the Court ought not for that reason to dismiss the bill with costs; but should order the cause to stand over, with liberty for the plaintiff, on payment of costs, to amend his bill by adding proper parties. *ibid.*

Penal Laws.

An information was exhibited by an officer of the customs against *A.* for the penalty of privately relanding *certificate* goods, contrary to the statute 8 *Ann. c. 13.* Some time afterwards, an act passed 18 *Geo. II.* indemnifying all persons from the penalties of running, landing, &c. any *prohibited* goods. The defendant pleaded this act in bar. But it was held, that the offence laid in the information, was not released or discharged by the Indemnity Act. *v. 75*

It is a known rule in law, that on filing an information, the informer has a right to the penalty vested in him; and that though the king may pardon the offence, so as to discharge his own share, yet he cannot discharge the share of the informer; for that would be to punish the officer instead of the smuggler. *v. 82*

The legal disability of an alien to hold lands, is neither a penalty or forfeiture. *v. 91*

Physicians.

An apothecary and freeman of *London* attended a patient, and made up and administered proper medicines to him, without the direction of a physician, or having any licence

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licence from the faculty, or demanding or taking any fee for his advice. Held, that this did not amount to a *practising of physic*, within the meaning of the statute, 14 and 15 Hen. VIII. c. 5. Vol. i. page 78

Plantations, see Foreign Law
Plea.

A. by his will made several provisions for his wife, which *B.* his son and heir after his death filed a bill against her to set aside; alledging, that she was never married to his father, or if she was, that she had been previously married to *P.* who was still living. To all the charges in this bill, except what related to her marriage with *P.* the defendant answered. But as to that charge, she pleaded her marriage with the testator, and cohabiting with him as his wife, and that she had a son by him who was still living; and therefore insisted, that she was not compellable to answer the matter of the marriage with *P.* as it tended to criminate and make her guilty of bigamy, which by law is felony. Plea allowed.

iii. 65

Plea of a general release containing the words *decrees and orders* of the Court of Chancery, is a good bar to any demand set up under a decree of that Court, prior to the date of the release. And if the defendant by his answer denies all the charges of fraud, &c. in obtaining the release, such answer is sufficient to corroborate the plea.

iii. 366

Where a party pleads his title, and swears himself a purchaser for a valuable consideration, without notice of the plaintiff's title, a Court of Equity ought not to allow any examination of witnesses *in perpetuam rei memoriam*, to defeat the title of such purchaser; but leave the plaintiff to recover as he can, without giving him any assistance.

iii. 473

To a bill filed in *Ireland*, the defendant pleads a decree and proceedings for the same matter in the Court of Chancery of *England*. Plea allowed.

iii. 584

Where a plaintiff replies to a plea, he admits it to be a good bar, if the facts therein alledged are true; and therefore he cannot afterwards complain of the order made for

allowing the plea, but must proceed to examine witnesses to falsify it. Vol. iv. page 74

The plea of a fine and long possession under it, is not a good bar to a bill brought for discovery of the deed, declaring the uses of such fine.

iv. 253

In a *quo warranto*, the defendant insists by his plea, on the charter of the corporation; but by his rejoinder he rests his defence upon a bye law of the corporation. This rejoinder is no departure from the plea.

iv. 455

To a bill brought for the renewal of a lease for lives, the defendant pleads the minutes of a decree in a former suit brought for the same purpose, by the person under whom the present plaintiff claimed, and by which minutes the Court ordered that bill to be dismissed. This plea ought not to be allowed, but should stand for an answer, with liberty to except.

vi. 73

Where a defendant by his plea insists, that he ought not to be obliged to discover the several matters mentioned in the introduction of it, and yet by his answer discovers those very particulars; the plea is bad in point of form, and cannot be supported.

vi. 116

A plea of privilege is a plea in abatement, and should be offered in the first instance to the Court in which the suit is commenced, and cannot afterwards be introduced by writ of error.

vii. 45

To a bill brought for setting aside certain leases as being improperly made, the defendant pleaded, that the question was properly determinable at law only; and the plea was allowed.

vii. 374

A. by lease grants *B.* a liberty of searching and digging for coals in certain lands, for a term of 100 years, rendering an eighth part of the coal by way of rent. The colliery is worked for some years, and then discontinued. The person claiming the land under *A.* begins to work the mine, whereupon those claiming under *B.* file a bill to restrain the working, and for a discovery of their title, in order to maintain an action of trespass. To this bill the defendants plead in bar, both to the discovery and relief, that *B.* and those claiming under him, had ceased working the

colliery

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colliery for a space of 55 years, and had therefore waived and relinquished the benefit of the lease. But the plea was overruled; the matter of it being properly determinable at law. *Vol. vii. page 404*

Pleadings.

It is an ancient and settled rule of pleading, that in all bars, avowries, conusances, &c. where the title is made under a particular estate, be it for years, for life, or in tail, the commencement of such estate must be shewn; for otherwise, the plaintiff would be debarred from ever controverting the title of the land, and it would be impossible for him to know what to reply. *i. 77*

Demurrer to a bill of review allowed, for that the decree had been made 27 years; and such bill being in the nature of a writ of error, ought not to be allowed, either by the words or equity of the statute which takes away writs of error to reverse judgments, after a lapse of 20 years. *i. 95*

In a *quare impedit*, the plaintiff declared upon his title to present to a living in the *second turn*, but did not lay any presentation made by him or any of his ancestors in that turn. He acknowledged a title in the defendant to the *first turn*, but did not set out the conveyances particularly, by which it was derived down to him. This declaration was held insufficient to maintain the plaintiff's action; and therefore judgment was given for the defendant. *i. 238*

It is against the known and established rules of all Courts of Equity, that after issue joined, publication passed, and the cause heard, the same matters, or the same title, should be drawn into question again, by another original bill; for if this was once admitted, it would introduce perjury, and make suits endless. *i. 283*

Where a defendant answers to the same matter, which by his plea he insists he ought not to answer, the answer overrules the plea. *ii. 16*

One defendant shall not be prejudiced, or concluded, by the admission of another. *ii. 225*

Where new matter is suggested by an amended or supplemental bill, foreign and repugnant to the title set up by the original bill; there can be no proceedings against the defendant, without serving him with a *subpœna ad faciend. attornat.* nor ought the cause to be brought to a hearing without such service; because the defendant should have an opportunity of defending himself against the new matter. *Vol. ii. page 225*

Where a suit abates by the death of the plaintiff, a person claiming *per formam doni*, and not as heir or representative, cannot revive; but must bring his original bill, or commence an action at law. *ii. 314*

Declaration upon a bond, conditioned for the payment of all monies which *J. S.* should receive on account of the revenue. The defendant pleads general performance. The Attorney General replies, that *J. S.* or some other person or persons by his order, received, &c. Held, that the averment of the receipt was only the introduction to the breach, the real assignment of the breach being the non-payment of the money: But however this would have been on a demurrer, it was cured by the defendant's rejoining that he had paid the money, which was an admission of his having received it. *ii. 375*

Upon a bill in the nature of a bill of revivor against a devisee, the defendant cannot dispute the justice or validity of the former decree; for if he could, a devisee would be in a better condition than an heir. *ii. 523*

Options.

A. on the marriage of his son settles lands, which he covenants to be 800 *l. per ann.* reserving to himself the power of charging the same with 1200 *l.* for the portions of his younger children. *A.* charged the estate with only 600 *l.* but because the lands were defective in value, the son refused to pay these portions, Held, that the portions were well charged, as they amounted only to a moiety of what the father had a power to charge; and if there was a deficiency in the value of the lands, the son ought

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ought to sue upon the covenant for a satisfaction out of his father's assets. Vol. i.

page: 20

A term of 40 years is limited for raising 2000*l.* either by *profits* or *sale*. The trustee takes possession, but makes no interest of the profits. Held, that the portion should carry interest from the time it became payable, the estate being sufficient, and the trustee might have raised it immediately.

i. 23

A trust term is created for raising portions out of *rents* and *profits*; these portions shall be raised by *sale* of the term.

i. 34

A younger child, whose portion, in case he died before 21, was directed to survive, attained 21, and received part of it, but died intestate in his father's lifetime, before the residue was paid. Held, that this residue did not lapse, or sink into the real estate, but subsisted for the benefit of the other children; and ought to be added to the father's personal estate, and disposed of according to his will. *ibid.*

A. by will gives 500*l.* to his daughter, to be paid by his executors at her age of 21, out of the *rents* and *profits* of his lands. The daughter marries at 18, and dies under 21. Decreed, that this portion should be raised for the benefit of the husband as administrator, by a *sale*.

i. 61

A. conveys lands to the use of himself and his wife for life, remainder to their first and other sons in tail; and for default of such issue, and in case A. should leave one or more daughters, then to J.S. for 500 years, to raise portions for such daughters. A. died, leaving both sons and daughters, and all the sons died without issue male. Held, that upon the death of the surviving son, the term arose and took place, and that it was not a *condition precedent*, but a remainder upon the determination of an estate tail.

i. 143

A portion charged on lands by virtue of a power, shall be raised by sale or mortgage, and not by the rents and profits of the lands charged, and why.

i. 202

Proviso in a marriage settlement, that 2500*l.* shall be raised for the issue of the marriage, in such proportions as the husband shall ap-

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point. There is issue only one child; and the husband dies without making any appointment. The child is entitled to the whole money.

Vol. i. page 351

Where provision is made in a settlement, that if there be but one daughter she shall have 500*l.* and 200*l.* a-piece to every other younger daughter, and there are three daughters; the eldest shall have but 200*l.*

ii. 263

A. on the marriage of his son, settles his estate in the usual manner, but subject to a proviso, that if A. did not in *his lifetime* dispose of his daughters in marriage, or raise portions for them out of the profits of his estate; he might at any time during his life, by will, deed, or other writing, charge the estate so settled, with 1500*l.* for his daughters portions. A. had two daughters, who married in *his lifetime*; but instead of giving them any portions in hand, he charged the estate by deed, with 750*l.* a-piece, payable to their respective husbands. Held, that the husbands were entitled to recover these portions, with interest.

ii. 343

Where a portion is directed to be raised by *annual* profits, and no particular time appointed for the payment of it; the portion is only due when the profits can raise it, and carries no interest in the mean time.

ii. 468. iv. 109

The trust of a term was for raising a portion for a daughter, in default of issue male, payable at 18 or marriage, or as soon after as the same might *conveniently* be raised. The mother died, leaving no son, and only one daughter. Held, that this portion could not *conveniently* be raised by sale of the reversion of the term, in the father's lifetime.

ii. 487

A term is created for raising, out of the *yearly* profits, several sums for the maintenance and education of younger children; and then to raise such portions *out of the estate*, not exceeding 2000*l.* as the father and mother, or the survivor, should appoint. Held, that this sum of 2000*l.* should carry interest from the time it might have been raised out of the yearly rents and profits of the lands; and an enquiry was directed, in order to ascertain that time.

iii. 51

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Lands

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Lands charged with a portion, afterwards descend to the party entitled to the portion. This is no extinguishment of the charge, although the value of the lands greatly exceeds the amount of the portion. Vol. iii.

page 132

Lands are limited to husband and wife for life, and in default of issue male of the marriage, to trustees to raise 2500 l. for daughters, payable at 21 or marriage, and out of the profits, to pay 100 l. *per ann.* for maintenance; *the first payment of the maintenance to commence after the estate of the trustees shall have come into possession.* The husband dies without issue male, leaving a wife and a daughter. This portion shall not be raised in the mother's lifetime, because the maintenance which is naturally to precede the portion, is not to be paid till the trustees are in possession. iii. 437

See further vol. vi. p. 539. v. vii. p. 223. Power.

A. gave the residue of his personal estate, and 400 l. to be raised out of a trust estate, to his two daughters, but directs them to make a distribution thereof among themselves and their brothers and sisters, in such proportions as they should think most fit and convenient, *according to their needs and necessities.* In this case, a double share of the whole was decreed to the eldest son and heir, because he was considered as standing most in need of it. i. 34

A general power to raise portions for daughters, may be restrained and qualified by a particular proviso. ii. 77

In a deed creating a term for raising portions, there is a power for the father, with the consent of the trustees, to revoke all the uses; this power suspends the portions, and they cannot be raised till after the father's death. ii. 487

Tenant for life with power to make leases of all lands anciently demised, reserving the *ancient rents*, and of other lands, reserving the *best improved rents*; makes a lease of part of the premises usually demised, reserving the *old accustomed rents*; and a lease of other part not usually demised, reserving *such sum of money as should amount to the best and most improved yearly rent.* Both these

leases are void as against the remainderman; the first, as not being warranted by the power; and the other, for its uncertainty.

Vol. iii. page 248

Where a power is given to a woman to dispose of her estate by will, and she afterwards marries, it seems, that the marriage is a suspension of her power; but if she survives the husband, her power revives. *Sed quære*, for the Lords directed a case to be stated, for the opinion of the Judges of B. R. iii. 308

A power of revocation is reserved to A. by any writing under his hand and seal; and of appointing new uses *by the same or any other deed.* A. by his will, without taking any notice of the power, devises the estate to B. This is a good execution of the power. iv. 523.

J. S. by marriage articles covenants to settle his estate to certain uses, reserving to himself a power of making leases for 31 years, or three lives. He grants a lease to A. for three lives, or 31 years, *which shall last longest.* Held, that this lease was supportable as a good execution of the power. vii. 111

Prerogative.

The King, by his prerogative, has a right to present to a church which becomes vacant by his promoting the incumbent to a bishoprick; but this right must be exercised in the lifetime of the person promoted, otherwise the King's turn is lost. iii. 427, note

Process.

A bill being filed in Ireland against a person resident in England, the defendant appeared, and sued out a commission to take his answer, returnable without delay; but before the answer could be prepared he was taken ill, and continued so for several months. In the mean time, the plaintiff proceeded in taking out the usual process of contempt; and having obtained an order that the bill should be taken *pro confesso*, the cause was heard, and a decree made. Afterwards, the defendant moved to set aside these proceedings and the decree, and that his

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His answer might be received; and upon payment of costs, it was ordered accordingly. *Vol. iv. page 546*

Promissory Notes.

A. gives *B.* a promissory note for 610*l.* as the difference in some stock-jobbing transactions. *B.* indorses the note to *C.* to whom he is indebted in a larger amount, and *C.* gives *B.* credit for the value in account. Held, that *C.* is a *bona fide* holder of the note, and not affected by the consideration for which it was originally given. *vi. 6*

Proxy.

A trustee of a living appoints another person to vote for him as his proxy, at a meeting of the trustees to elect a parson to the church. Subsequent to the date of the appointment, but at a meeting previous to the day of election, the trustee appeared, and voted in person. This personal appearance was held to be a revocation of the proxy. *v. 12*

The right of electing either trustees, or a vicar, is a personal trust, and a matter wherein discretion and judgment are to be exercised; no man therefore ought to make a proxy in any such case, unless some special custom enables him so to do. *v. 13*

Purchaser.

Voluntary articles shall not be set up against a purchaser for valuable consideration; although he had notice, by being a subscribing witness to the articles. *i. 5*

A. contracts for the purchase of an estate, and is let into possession. The estate being greatly incumbered, *A.* pays off the incumbrances. Great delay is used on the part of the vendor; but *A.* shall not, for that reason, be discharged from his contract. *i. 218*

Where a man bids for an estate sold under a decree of the Court of Chancery, and is allowed by the Master to be the purchaser, whose report is absolutely confirmed, and a deposit made; yet, upon special circumstances, the Court will open the bidding. *vi. 148*

There is no rule subsisting, or ever has subsisted, to prevent the Court from exercising its discretion in opening biddings; but the practice rests wholly upon the circumstances of the case, and the discretion of the Court. *vi. 155*

Recovery.

TENANT in tail suffers a recovery in the lifetime of the jointress, but she is not made a party to it. This recovery is void, for want of a good tenant to the precipe. *i. 69*

A recovery mentions only *two messuages*, but the deed of uses, besides mentioning these messuages, has the general words of *all other the messuages, lands, tenements and hereditaments of the said B.* Held, that the deed and not the recovery, shall be the measure of what passes. *i. 156*

A. seised of the manors of *O.* and *B.* devised the same to *C.* for life, and if he should have issue male, then to such issue male and his heirs for ever; but if *C.* should die without leaving issue male, then the testator devised the manor of *O.* to *J. S.* in fee; and the manor of *B.* to *J. N.* in fee. *C.* suffered a recovery of both these manors, and it was held sufficient to bar the contingent estates limited to *J. S.* and *J. N.* *ii. 1*

A person educated in a Popish seminary is, notwithstanding any incapacity incurred by him on that account, still capable of suffering a common recovery. *ii. 203*

Where a fine and recovery is of so many acres in *S.* the party interested shall have his election, where and in what parts of the estate, the fine and recovery shall operate. *ii. 466*

Where there is no freehold in the tenant against whom a recovery is had, this recovery will not bar the subsequent remainders. *iv. 405*

Tenant in tail with the reversion in fee *ex parte materna*, suffers a common recovery; the old use is gone, and the lands descend to his right heir. *iv. 486*

Where

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Where a jury find a recovery without seisin, the verdict is imperfect, and no *venire facias de novo* shall be awarded. *Vol. iv. page 504*

As a common recovery pursues the forms of a real action, it is of absolute necessity that the vouchee, against whom the judgment is obtained, should be living on the day when such judgment is given by the Court, for otherwise the judgment is erroneous. And therefore, where the writ of summons was made returnable on a *Sunday*, and the vouchee died the same day, the judgment in the recovery was reversed. *vi. 132*

A. is tenant for life, with remainder to trustees to preserve, &c. remainder to his first and other sons in tail male, remainder to his daughters in tail general, remainder to the heirs of his body, with remainders over. *A.* suffers a recovery with single voucher, being himself tenant to the writ: This recovery is not good to bar the remainders expectant upon the estate tail of *A.* Nor is it cured by the *Irish* act of 21 *Geo. II. c. 11.* which is formed pretty much upon the plan of the *English* acts of 10 and 11 *Will. III. c. 14.* and 14 *Geo. II. c. 20.* *vi. 209*

A recovery suffered of lands devised by a will previously made, is a revocation of such will, as to the lands of which the recovery is suffered. *vii. 179*

Rehearing.

A decree was made *ex parte* against *A.* to pay a moiety of a sum of money said to be due from *A.* and *B.* to *C.* upon a stated account between *C.* and *B.* but to which *A.* was not privy. Some years passed before *A.* knew of this decree; but on being informed of it, he applied by petition to have the cause reheard. This was refused, and the petition dismissed; but on an appeal, the order of dismissal was reversed, and the Lord Chancellor was directed to rehear the cause. *iv. 152*

After a decree has been signed and inrolled, it is too late to apply for a rehearing of the cause. *iv. 444*

On application to rehear a cause, an order is made that the petitioner should be at

liberty to rehear the cause, on payment of all the costs incurred since the decree, within a week after service of a taxed bill of costs. But on an appeal from this order, it was declared, that there was not a sufficient ground for the Court's imposing these terms on the petitioner; but that it would have been sufficient for the Court to have required him to give security for, or submit to pay the costs, in case the decree should not be materially varied upon the rehearing. *Vol. v. page 152*

Remainder.

An estate was limited (after several precedent estates for life and in tail) to *A.* for 99 years, if he should so long live, remainder to trustees to preserve, &c. remainder to the first and other sons of *A.* successively in tail male. The precedent estates being determined, *A.* came into possession, and having a son who had attained 21, they levied a fine and suffered a recovery, in which the son was vouched. The son died without issue, and afterwards *A.* died without leaving any other son. The next remainderman made an actual entry within five years; and upon a question, whether the recovery had barred his remainder, it was held that it had not; there being no freehold in the tenant against whom the recovery was had. *iv. 405*

A. settles his estate to himself for life, remainder to *B.* his eldest son in tail male, remainder to *C.* his youngest son in like manner, remainder to his own right heirs. *B.* being in possession, grants leases with covenants for a perpetual renewal, and afterwards dies without issue. *C.* enters and levies a fine, the uses of which are declared to himself in fee. This fine extinguishes the estate tail limited to *C.* in remainder, but lets in the reversion which he took as heir at law of *B.*, and therefore binds him to a performance of *B.*'s covenants in the leases. *iv. 594*

Rents.

The owner of a fee farm rent issuing out of a manor, shall only pay taxes for the rent, in

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In proportion as the manor is taxed. *Vol.*

i. page 131

A manor belonging to a bishop's see, was usually leased out for lives, at a rent of 49*l.* 3*s.* 4*d.* One of the bishops, on renewing this lease, excepted the demesnes, which were worth 32*l.* 11*s.* 1*d.* *per ann.* but he reserved the full ancient rent of 49*l.* 3*s.* 4*d.* This bishop however, accepted a rent of 16*l.* 12*s.* 3*d.* being the proportion after deducting for the demesnes, in full of the whole reserved rent. But this acceptance will not bind his successor, who is entitled to the full rent reserved by the lease, i. 502

Where by great length of time it is become impossible to know out of what particular lands ancient quit rents are issuable, Courts of Equity have exercised a jurisdiction; and on proof of payment within a reasonable time, have decreed a satisfaction for all arrears of such rents, and payment of the same for the future. iv. 139

Request in a will held to operate as a command. v. 534.
1410. **Revocation.**

A. devises lands to his son B. for 99 years, determinable on three lives, and charges them with an annuity of 40*l.* to his daughter M. He afterwards devises these lands to S. for 99 years, determinable on three lives, reserving a yearly rent of 50*l.* Held, that the demise was a revocation of the devise, but not of the annuity, there being rent enough reserved to satisfy it. i. 160

J. H. by will devises the residue of his real and personal estate to J. P. and his issue male, with remainders over. He afterwards conveys his real estate to a trustee, to the use of himself for life *sans waste*; and then to such uses as he should by deed or will appoint. J. H. dies without altering his will, or making any appointment. Held, that this conveyance was a revocation of the will. i. 387

A conveyance to different uses, is an effectual revocation of the former uses, without any recital of the power to revoke. iii. 543

A Papist having a power of revocation under a settlement made prior to the popery acts,

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executes that power after the passing of these acts; held, that the revocation was good. *Vol. vi. page 58*

Where a man after making his will, suffers a recovery of part of the lands devised, it operates as a revocation of the will, *quoad* the lands comprised in the recovery. vii. 179

Under what circumstances, a subsequent will shall not operate as a revocation of a former one. vii. 344

Satisfaction.

BY a marriage settlement, 2500*l.* was provided for the portions of the issue of the marriage, in such proportions as the father should appoint. There was issue only one child, for whom the father on his second marriage made provision, by settling a real estate, and he also gave her a legacy by his will; but died without making any appointment of the 2500*l.* Held, that this child was entitled to the whole 2500*l.* and that none of the other provisions were to be deemed a satisfaction. i. 351

Lands settled in jointure, are covenanted to be of the yearly value of 1000*l.* The husband by will gives the wife 1000*l.* and other legacies. The jointure lands prove deficient 300*l.* *per ann.* Held, that the legacies which were admitted to be of greater value than the defect of jointure, ought to be taken in satisfaction of such deficiency. i. 553

J. S. covenants to lay out 7500*l.* in the purchase of lands, to the use of himself for life, with remainder to his first and other sons in tail male. He purchases lands in fee of that value, and permits them to descend to his eldest son. Held, that the lands so descended, are a satisfaction of the covenant. v. 552

So if a man covenants to leave his wife a certain sum, and dies intestate, and the widow's distributive share of the assets amounts to the sum covenanted, she cannot have both, but the one shall be deemed a satisfaction of the other. v. 567

7 P

A

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A. previous to his marriage, covenants to secure to his wife an annuity of 1000*l.* a year, issuing out of lands, for her jointure, and in bar of dower. The marriage is had, and *A.* by his will devises to his wife certain parts of his real and personal estate, of considerable value. Held, that she was entitled both to the estates devised, and to her annuity, and that the one was not intended as a satisfaction for the other.

Vol. vii. page 12

To make a devise or bequest a satisfaction for a collateral demand, or performance of a prior contract, it must be *ejusdem generis*, and not land for money, or money for land; or must at least be of such certain and known value and estimation, and so far of the same nature of the thing to be satisfied therewith, as to appear indisputably to be equivalent, or superior, not only in gross value, but in annual income, to the debt or demand, or the thing to be performed. *vii.*

20

Settlements.

A. on his marriage settled lands to the use of himself for life, remainder to his wife for her jointure, remainder to the first and other sons of the marriage in tail male; reserving to himself a power of charging the estate with 3000*l.* for younger children, or the payment of debts; and covenanted to lay out 6000*l.* part of the wife's portion, in the purchase of lands, to be settled to the same uses. The 6000*l.* was not laid out. After the eldest son of *A.* came of age, it was agreed, in consideration of his advancing 3000*l.* for the purchase of a commission in the army for the son, to make a new settlement more beneficial for the younger children. Accordingly, a settlement was made, whereby the lands were limited to the former uses, but *A.* was empowered to charge 3000*l.* for each of his younger children; and his covenant to lay out the 6000*l.* was released. On a bill being filed to set aside this subsequent settlement, and to have the 6000*l.* laid out pursuant to the covenant, the Court dismissed the bill, but without costs. *v.*

58

By a settlement made previous to the marriage of *A.* and *B.* certain Exchequer annuities were vested in trustees, in trust for the husband for life, then to the wife for life, and after both their deaths, for the children of the marriage equally, at their ages of 21, *happening after the death* of the father and mother. There was issue only one son, who attained 21, and survived his father, but died in the lifetime of his mother. Upon a question between her and the son's executor, who was entitled to these exchequer annuities, it was held, that they became vested in the son on his attaining 21, and were deviseable by him, notwithstanding he died in his mother's lifetime.

Vol. vi. page 260

A settled estate is sold, but no part of the money is laid out in the purchase of other lands; yet the Court will, under certain circumstances, presume an agreement between the parties interested, that it should be so laid out, and upon such presumption will decree the money to that person who would have been entitled to the land, if any purchase had been made. *vii.*

21

Statutes.

By a statute made in Ireland, 21st September 1703, the heir of a Papist must file the bishop's certificate of his conformity, within a year *after* his age of 21, yet he may conform and file the certificate *before* his age of 21. The act being meant only as an encouragement for persons to renounce Popery. *ii.*

34

The statute 33 *Hen. VIII. c. 39.* says, that all obligations or specialties made to the King or his heirs, shall be made payable in these words, *solvend. eidem domino Regi hæred. vel executoribus suis.* But a bond taken to the King, his heirs and successors, was held to be good; these words in the statute being only directory. *ii.*

375

A statute made to prevent fraud, shall never be used as a means to cover it. *ii.*

425

Every act of Parliament, in which no particular time is specified for its commencement, is held to operate and take effect from the

the

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the first day of that session in which it is made. *Vol. vi. page 553*

Statute of Limitations.

J. S. being indebted by simple contract, which was barred by length of time, made his will, and thereby devised lands in trust for the payment of his debts. This devise does not revive the debt; and to a bill filed by the creditor to have the benefit of this trust, a plea of the statute was allowed. *iii. 305*
 In what case a Court of Equity will restrain a man from pleading the statute to an action at law. *iv. 328*
 Under what circumstances a right of entry is barred by the statute of limitations; and in what case a defendant in ejectment may have the benefit of that statute, without specially pleading it. *v. 247*

Taxes.

THE owner of a fee-farm rent issuing out of a manor, shall only pay taxes for the rent, in proportion as the manor is taxed. *i. 131*
Prisage is an ancient duty in specie, on goods imported, and may be granted away by the Crown; but goods chargeable with this duty, are not thereby exempted from the payment of other duties. *i. 319*

Tender.

In an action upon a contract for the sale of stock, it is necessary for the plaintiff to shew that he made a legal tender of the stock, before he can claim the money; for his attending at the office on the day, and being ready to transfer, is not sufficient. He ought also to set out in his declaration, the manner of transferring stock, and the time and place when and where it is usually transferred; these being matters which the Court cannot take notice of judicially. *iii. 91*

Tithes.

In a suit for tithe of hay, the defendants, by their answer only, set up several moduses,

under the name of *strew-tithes*; in this case an issue is proper to try the validity of these moduses. *Vol. i. page 140*

Tithe of corn, ground in a horse malt mill, is a personal tithe, and not payable by the tenth toll-dish of the corn ground, but by a tenth part of the clear profits, over and above all incident charges. *i. 157*

A modus of *12d.* an acre for low meadows, and *8d.* an acre for high meadows, in lieu of tithe hay, are good moduses. *i. 214*

A large common extends itself into several parishes, and by custom, the owners of cattle fed upon this common, pay tithes of such feeding to the parson of the parish where they respectively live, and not to the parson of that parish in which the cattle occasionally feed. This is a good custom. *i. 278*

The tithes of a rectory which belonged to a dissolved abbey, are granted by the Crown to *A.* The parson brings his bill against the occupiers for an account of tithes, and they set up moduses paid to the grantee of the Crown. Bill dismissed. *i. 547*

Tithes of beans and peas set and planted in rows, in a garden-like manner, are small tithes; and the use of a plough instead of a spade makes no difference. *ii. 31*

On a bill brought for tithes of houses in *London*, after the rate of *2s. 9d.* per pound of the yearly rent, according to the statute *37 Hen. VIII.* the Court directed an issue, to try whether less than that sum had been paid, though there was no proof of any regular modus. *ii. 437*

By the several statutes of dissolution, tithes in the hands of laymen, are declared to be temporal inheritances, and lay fees. They have also the like remedy for recovery of them in the temporal Courts; and may sue for them in like manner as for lands, &c. and tithes have at this day all other incidents, belonging to temporal inheritances. *ii. 517*

Tithes of fish are payable only by custom, and cannot be claimed as a mere personal tithe, *deductis expensis*; for where tithes in kind are due only by custom, it seems impracticable to deduct the expences. *iii. 479*

Lands

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Lands exempted from tithes, as being part of the demesnes of an ancient monastery, are inclosed by act of Parliament, but shall not be made liable to tithes by any *general* words in the act. *Vol. iii. page 521*

In a suit for tithe of lambs, the defendant sets up a modus of 3*d.* for every lamb, payable on St. *Mark's* day, or so soon after as demanded. This modus is not void in law, but the validity of it shall be determined by a jury. *iv. 212*

Where a plaintiff claims tithes in kind, and the defendant sets up a modus, if the plaintiff declines trying the modus at law, it shall be taken against him *pro confesso. ibid.*

In a suit by a vicar for tithes, the occupiers insist on certain exemptions, but the impropiator by his answer, admits the vicar to be entitled to all tithes, except corn and grain. On this admission, the Court decreed for the vicar, without hearing the evidence touching the exemptions. But this decree was reversed on an appeal, and the Court was ordered to rehear the cause, upon the pleadings and proofs. *iv. 216*

An old decree for the payment of tithes, is evidence of the vicar's right, though no endowment can be shewn, nor any proof made of payment in pursuance of that decree. *iv. 216, 235*

A parson may sue in a Court of Equity for his tithes, be the amount of the demand ever so small. *iv. 314*

Hops are not titheable, before they are picked and gathered from the bind or stem. *v. 99*

In what case, and under what circumstances, a person claiming title to tithes, must have his right established at law, before he can come into a Court of Equity, for an account and satisfaction. *v. 513*

Tithes are by law denominated and adjudged to be great or small, according to the nature of the thing, and not from the mode of cultivation, or the use to which it is applied. *v. 586*

An agreement is made between the rector and inhabitants of a parish, for a pecuniary

composition in lieu of tithes in kind; which is afterwards confirmed by a decree of the Court of Chancery, and is constantly acquiesced under for upwards of fourscore years. But the patron and ordinary not being parties to this agreement, it is not binding. *Vol. vi. page 332*

How far a vicar may avail himself of his general title to tithes, in opposition to a pecuniary composition established by deed executed by parson, patron and ordinary. *vii. 493*

T r i a l.

Upon the trial of an ejectment in *Ireland*, on the demise of a peer, the defendant challenged the array of the panel, because the sheriff had not returned a Knight. But the challenge was over-ruled, and the array affirmed, because the sheriff could not know by the *venire*, which was his authority for impannelling the jury, that a peer was the lessor of the plaintiff, or any way concerned in interest. *ii. 114*

The reason why in ejectments one trial does not bind the inheritance, is not from any rule or maxim of law, that one trial cannot conclude the right, for in proper actions that may be done; but from the peculiar nature of an *ejectione firmæ*, in which no judgment as to the inheritance can be given. *ii. 258*

Where a decree directs a trial at law upon the title, and at the same time awards an injunction to put the plaintiff into possession of the premises in question, it must be reversed for repugnancy. *ii. 267*

N e w T r i a l.

On a motion for a new trial of an issue directed by the Court of Chancery, several affidavits were offered to be read, in addition to the evidence given on the trial; but the Court would not permit these affidavits to be read, and the Judge having certified his satisfaction with the verdict, the motion was refused. On an appeal, the House of Lords, *after debate*, suffered the affidavits to be read; but dismissed the appeal

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appeal, and affirmed the order. *Vol. iii.*

page 214

A new trial was granted on reading some letters of the defendant's, wherein he had put a greater value upon the premises in question, than what the jury had found by their verdict; although these letters were in the plaintiff's power, and might have been produced on the former trial, if he had thought fit. *iii. 218*

In what case the former verdict may be given in evidence, upon a new trial. *iii. 222*

Under what circumstances a new trial may be granted, after a trial at bar. *v. 180*

The mistake of a juror's name in the panel, or the discovery of new witnesses to impeach the testimony of a witness examined on the former trial, are not circumstances sufficient to induce the Court to grant a new trial. *vi. 538*

Courts of Equity often direct new trials in suspicious cases, and especially where fraud or forgery is imputed to a will; and a further discussion has frequently contributed to the suppression of fraud, and the furtherance of justice. *vii. 1*

But though there were two trials upon this will, and the verdicts opposite, the one being for the will, the other against it; yet an order for a trial at bar was reversed. *vii. 208*

Where the Judge expresses himself dissatisfied with the verdict, it is a good ground for directing a new trial. *vii. 265*

Trust and Trustees.

A public company being trustees of a charity, mismanage the fund, and neglect the objects of it. Held, that they shall make good the deficiency out of their own estate, and pay the costs of the suit. *i. 9*

Executors being in the nature of trustees, shall be liable to costs, where they misbehave in the execution of their trust. *i. 115*

A. as the guardian of an infant, made a claim to certain lands before the trustees of the *Irish* forfeitures; which being allowed, he

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entered on the lands. Part of these lands being out upon lease, *A.* procured a derivative lease thereof to himself; but this lease was held to be a trust for the infant.

Vol. i. page 171

The determination of the trustees of the *Irish* forfeitures, is binding and conclusive to all parties, and no appeal lies from it.

i. 178. v. 478

The equity of redemption of a mortgaged estate is conveyed to *A.* in trust for the payment of debts, and the surplus to *B.* *A.* agrees with the mortgagee to turn an arrear of interest into principal. *B.* is bound by this agreement, though not a party to it. *i. 309*

Trustees in a will to support contingent remainders join with the tenant for life in a conveyance, whereby the contingent remainders are destroyed before they come *in esse*. This is a plain breach of trust, and whoever claims under such conveyance, having notice of the trust, shall be liable to make good the estates. *i. 359*

A. devised to his wife a rent charge of 200*l.* for thirteen years, in trust for the payment of his debts and legacies. He also devised to her certain lands in augmentation of her jointure. The surplus of this rent charge, after debts and legacies paid, is not a beneficial trust for the wife, but a resulting trust for the heir. *i. 372*

A corporation are trustees of a charity, and in possession of the charity estate, but suppress or conceal some part of the evidence relating to the charity; for this they shall pay the costs of the suit. *i. 399*

Devise of personal estate for the payment of debts and legacies, and the overplus to be disposed of as the testator should by codicil direct. Part of the real estate is also devised for the payment of particular debts; and the residue to go as he should by codicil direct. The testator by a codicil directs, that the *overplus of such real estate* shall go to his executors, for performance of his will; and then adds, "I hope I have made a sufficiency for performance

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- “ of my will, and if there be any overplus of
 “ my *personal* estate, after full performance,
 “ I give it to J. S.” Held, that J. S.
 was entitled to the residue of the real estate,
 and that there was no resulting trust for
 the benefit of the heir. Vol. i. page 478
- A. agrees for a lease of 41 years. B. ad-
 vances the money to pay the fine, &c. and
 the lease is taken in his name, without any
 declaration of trust. Held, that B. was a
 trustee for A. and upon being paid the
 money he advanced, with interest, he
 should assign the lease to A. account with
 him for the profits, and pay him his
 costs. Held also, that the trust being
 proved by letters of the defendant’s hand-
 writing, this case was not within the
 statute of frauds and perjuries. ii. 39
- Gross misbehaviour of a corporation in the
 management of a charity, is a sufficient
 ground for a Court of Equity to direct
 the trust estate to be conveyed to persons
 more able and willing to execute the trust
 faithfully, for the benefit of the poor. ii.
 236
- A. by marriage articles covenanted, that all
 the lands which he should afterwards pur-
 chase in the parish of K. should be to the
 uses of the articles. He purchased lands in
 K. and took a conveyance thereof in fee,
 in the name of his youngest son; but there
 was no declaration of trust. Held, that
 the son was a trustee for his eldest brother,
 who was entitled to these lands by virtue
 of the covenant. ii. 350
- In what case the assignment of a right to no-
 minate a preacher, will amount to a breach
 of trust. ii. 368
- Trustees may lend trust money upon a good
 personal security, till a proper purchase of
 lands can be had; but are not justified in
 placing it in any fluctuating, or precarious
 public fund. ii. 577
- On a reference to a Master to take an ac-
 count of money advanced by a trustee for
 the fine, &c. of a lease, three several com-
 missions issue for examining witnesses, to
 prove the articles of the charge. Two of
 the commissions are returned, but before
 the return of the third, the Master makes
 his report *ex parte*. This is irregular, the
 Master must review his report, and all
 the orders and proceedings grounded up-
 on it, must be set aside. Vol. iii. page 82
- A. is a trustee for B. as to an estate, and
 lays out money in relation to it. B.
 assigns the trust to C. who brings a bill
 against A. for a conveyance. Held, that
 C. should have no conveyance, until A.
 was repaid all the money expended by him
 about the premises. But this decree was
 reversed; there being no contract between
 A. and C. relative to the money so ex-
 pended. iii. 449
- Lands are devised to trustees and their heirs,
 in trust to pay several legacies and annuities,
 and then to pay the surplus rents and pro-
 fits to A. for life, for her separate use; and
 after her death, the trustees to stand seised to
 the use of the heirs of her body, with re-
 mainders over. This is a use executed in
 the trustees during the life of A. and she
 has only a trust in the surplus rents and
 profits, for her life. iii. 458
- C. lends money upon the mortgage of a copy-
 hold estate, and takes the surrender in the
 name of D. who executes a declaration of
 trust. C. afterwards purchases the equity
 of redemption, and in like manner takes
 the surrender in the name of D. but no de-
 claration of trust is executed as to this
 second surrender. Held, that the heir of
 D. is a trustee of the estate for the heir
 of C. and that D. having expressly declared
 the trust of the first surrender, there was
 no necessity for a new declaration of trust as
 to the equity of redemption. iv. 67
- A. purchases an estate in the name of B. and
 suffers him for many years to act as the
 owner of it, by receiving the rents, &c. but
 B. never executed any declaration of trust.
 After both their deaths, the heir of A. in-
 sists, that B. was only a trustee for A. as to
 this estate, and brings his bill against the
 heir of B. for a conveyance, and an account
 of rents and profits. Bill dismissed with
 costs. iv. 258. *Sed vide* 337.
- Where property is deposited in the hands of
 three persons, and two of them go abroad
 out

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out of the kingdom, the one remaining shall be answerable for the whole value. *Vol. iv.*

page 328

In what case a trustee shall not avail himself of the statute of limitations. *ibid.*

Where the lord of a manor by feoffment, grants certain parcels of common, or waste land to trustees, for the benefit of themselves and the rest of the tenants of the manor; the whole of the lord's interest passes, and there is no resulting trust for him as to the ownership of the soil. *v. 326*

It is a universal proposition, and of great moment to the safety and property of mankind, that a trustee ought strictly to pursue the tenor of his trust, without perverting it directly or indirectly, to his own personal advantage. And therefore, where an executor, intrusted with the disposition of some church preferments, made a presentation to *A.* under a secret condition for his own benefit, the presentation was set aside, and he was decreed to present a more proper person. *v. 400*

Wherever a trustee becomes incapable of performing his duty, it is the office of a Court of Equity to interpose and guide him; whether his incapacity proceeds from weakness or corruption: And there is no instance, where the Court is bound in conscience to set aside the act of a trustee, in which it has not at the same time decreed the proper act to be done; not by referring the matter to his discretion, which is forfeited, but by directing him, as a mere instrument, to perform the thing decreed. *v. 411*

Constructive trusts, or trusts resulting by implication, are not within the statute of frauds and perjuries, but arise from the apparent nature of the transaction. *vi. 12*

Parol evidence of a trust is not admissible. *ibid.*

Under what circumstances, a trustee or executor shall be chargeable with interest for money in his hands. *vi. 319*

In all questions of resulting trusts, the rule of judgment must be the nature and circumstances of the case, and not any general rule; for none such there is, or can be. *vi. 480*

Nothing is better established as a general proposition, than that where a trustee for an infant renews a lease in his own name, the renewed lease shall enure for the infant's benefit. This is a doctrine founded on general policy, to prevent frauds; and has long been an established rule in Courts of Equity. *Vol. vii. page 128*

A trustee is only answerable for fraud, or a gross neglect, which is equal to fraud; and therefore where trust money is suffered by a trustee to remain in the hands of *A.* with the privity and approbation of the parties beneficially interested, instead of laying it out in a purchase, pursuant to marriage articles, and *A.* becomes insolvent; the trustee is not in this case answerable. *vii. 293*

J. S. grants a lease to *A.* which is intended to be in trust for the lessor, and *A.* declares the trust in writing accordingly. This lease is afterwards surrendered, and *J. S.* grants a new lease to *B.* without any trust being declared. Held, that *B.* was entitled to the whole benefit of the new lease, and that there was no resulting trust for the representative of *J. S.* *vii. 526*

All trusts by operation of law, are to be created by rules established in Courts having the jurisdiction of trusts. These rules have gone no farther, than to cases of purchases made by one man in the name of another; where, if the nominee is a stranger to the purchaser, the implication of a trust is necessary. But no case has extended an implied trust, as between a lessor and lessee; nor is it possible that any implied trust can subsist between parties in that relation; because every lessee is a purchaser by his contract and his covenants, which excludes all possibility of implying a trust for the lessor; and therefore, if in that case there be any trust at all, it must be declared in writing. *vii. 532*

U D I C T.

On the trial of an issue joined upon a *mandamus*, the jury find a special verdict as to the facts, but omit to find damages or costs. This verdict is imperfect, and therefore no judgment ought to be given upon it, but a *venire facias de novo* should be awarded. *iv. 271*

A G E N E R A L I N D E X.

A verdict certified by the judge to be entirely to his satisfaction, is never suffered to be impeached by affidavits, as being contrary to evidence; and though the jury state the particular evidence on which they find the fact, yet this is only surplusage, and will not vitiate the verdict. *Vol. iv. page 611*

After a verdict, a writ of error will not lie for a misfinding of the jury, but the proper remedy in that case, is by application for a new trial. *vii. 48*

Voluntary Conveyances.

A. made a voluntary settlement of lands, subject to an annuity of 100 *l.* to his youngest son, in trust for his eldest son and his heirs. The eldest son being dead, the father made another voluntary settlement of the same lands, to the use of himself for life, remainder to his youngest son for life, remainder to trustees to preserve, &c. remainder to the first and other sons of his youngest son in tail. Both these deeds being found after the father's death, a bill was brought by the youngest son against the son and heir of his elder brother, to set aside the first settlement, and establish the second. But as to any relief against the first deed, the bill was dismissed; and the plaintiff was decreed the arrear and growing payments of his annuity under that deed. *i. 122*

C. having two sons by her first husband, made a voluntary settlement in their favour, previous to her second marriage; but without the intended husband's privity. This shall bind the second husband, and all claiming under him. *i. 181*

A father's voluntary settlement upon his children, otherwise unprovided for by him, may, when neither creditor, purchaser, or any other having claim upon the father's estate is concerned, be carried into execution by a Court of Equity, as answering the father's natural obligation to provide for his children. But this obligation extends not even to the nearest collaterals; consequently, no such settlement by one brother upon another, can be entitled to the aid of a Court of Equity. *vii. 276*

W. equity will assist a volunteer claiming under a secret covert will, made under a power reserved before marriage by agreement with the husband against an heir.
v. vi. p. 170.

Waste.

PLOUGHING, burning, breaking, or sowing of down-land is waste; and the Court will award a perpetual injunction to restrain it. *Vol. i. page 357*

Wills.

The witnesses to a will subscribe their names at a window in a passage, where they could see but a part of the bed on which the testator lay, and he could not, as he lay there, see them attest his will. This will was set aside, as not being *duly* executed. *i. 137*

A subsequent conveyance of a devised estate, operates as a revocation of the will, *pro tanto*. *i. 387*

A will shall have relation only to the time of the testator's death, and not to the time of its being made, for till his death, he is master of his own will. *ii. 34*

It belongs to the Spiritual Court only, to determine upon the validity of a will of personal estate, and the sanity or insanity of the testator. *ii. 476. iv. 358. vii. 319*

A codicil attested by three witnesses, and ratifying a will, amounts to a republication of that will, and both ought to be taken together as one will. *iii. 107*

Where there is any doubt upon a will respecting lands, the validity of it must be tried at law; and the Court of Chancery ought not to make any final determination upon the will, before such trial is had. *iii. 358*

Where a man makes two wills, one dated the 14th of *May*, and the other the 9th of *December* following, and several codicils to each; if the will of the 14th of *May* is proved to be confirmed after the will of the 9th of *December*, without any other circumstance; or if the will of the 9th of *December* is proved to be confirmed after the will of the 14th of *May*, without any other circumstance; the whole estate comprised in the will so last confirmed, will go according to the limitations in that will. *v. 45*

Two inconsistent wills of the same date, neither of which can be proved to be last executed, are by the common law of *England*, void for uncertainty, so far as they are

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are inconsistent, and will let in the heir; if no act of the testator, subsequent to the wills, has explained them, so as to reconcile what otherwise would appear to be inconsistent.

Vol. v. page 57

Where a father, disposing of his estate by will, happens to give a younger son what was settled upon the elder, and at the same time gives the elder some other provision, if the elder will defeat the will in any part, he shall not take any benefit under it. v. 180. *note.*

Words of desire, advice, and recommendation to an executor, are always deemed legatary, especially when accompanied by a devise expressly in trust; and convey a right or interest, which may be maintained in a Court of Equity, even though the testator himself should forbid any suit or action to be brought for the performance of his will in that respect. v. 410

Where a testator uses terms expressive of his desire, hope, request, &c. or words of command, direction, &c. it is the same thing; for in either case he intimates or expresses what his will is, and that ought to be observed, and to prevail. v. 545

Where the validity of a will is impeached by a suit in the Ecclesiastical Court, as to the personal estate, and another in the Court of Chancery, as to the real estate, and the will is established by a sentence of the Ecclesiastical Court, the bill in Chancery ought to be dismissed. vii. 319

Where the degree of capacity which is competent to make dispositions of property va-

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lid in law, is once ascertained to belong to the party disposing, all beyond is resolved into a dispute about the several degrees of light and shade which brighten or obscure the understanding; these are very difficult to be distinguished, and cannot be precisely marked out; and therefore the strength or weakness of understanding, above the degree of competency, serves only as a circumstance of evidence, where the question is a question of fraud; for to give it any other effect, would be of the most dangerous consequence in the transactions of mankind.

Vol. vii. page 341

A man makes a will in 1748, and another in 1756. The first will is produced, but the other cannot be found, and yet upon an issue, the jury find that the latter will was different from the former, but in what particulars was unknown to them. Held, that under these circumstances, the latter will was not a revocation of the former. vii. 344

A subsequent, substantive, independent will of lands, is not, in its own nature, a revocation of a former will, nor will operate as such, unless it contains words expressly revoking the former, or makes a different and incompatible disposition of the same lands.

vii. 349

Where a will recites and refers to a voluntary deed, which cannot, after the testator's death, be found, this reference and recital will establish the deed, and it will be considered as incorporated with, and constituting part of the will. vii. 500

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F I N I S.

